111-347

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 292.

THE UNITED STATES, APPELLANT,

vs.

HERBERT M. CARPENTER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 16, 1881.

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1 By the honorable Rensselaer R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota.

To Herbert M. Carpenter:

Whereas the United States of America has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the district of Minnesota, made in favor of you, the said Herbert M. Carpenter:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the tenth day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of St. Paul, in the district of Minnesota, in the 8th circuit, the 6th day of January, A. D. 1881.

R. R. NELSON,
One of the Judges of the U. S. Circuit Court, District of Minn.

2 (Indorsed:) In Supreme Court. In equity. The United States vs. Herbert M. Carpenter. Citation. Due & personal service of the within citation this 6th day of January, A. D. 1881, is hereby admitted. John B. & W. H. Sanborne, att'ys for respondent Carpenter. Chas. Devens, Att'y Gen. Wm. W. Billson, U. S. dist. att'y.

3 *Bill of complaint.*

Circuit court of the United States, district of Minnesota. In equity.

THE UNITED STATES OF AMERICA
vs.
HERBERT M. CARPENTER.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota of the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundredth and fourth year.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on the twenty-third day of February, A. D. 1880, came the complainant, by Wm. W. Billson, esq., its solicitor and of counsel, and filed in the clerk's office of said court his bill of complaint, in the words and figures following, to wit:

Circuit court of the United States for the district of Minnesota. In equity.

To the honorable the judges of the circuit court of the United States of
4 America for the district of Minnesota, eighth judicial circuit, sitting in equity:

The United States of America brings this its bill of complaint against Herbert M. Carpenter, a citizen of the State of Minnesota and resident of the city of Minneapolis therein, and thereupon your orator complains and says that the tract of land situate in the present county of Pipestone, in

the State of Minnesota, and now known and described as the southwesterly quarter of Section one (1), in Township one hundred and six (106), Range forty-six (46) West, of the fifth (5th) Principal Meridian, according to the Govment survey thereof, was, on the 19th day of April, A. D. 1858, and for a long time prior thereto had been and ever since has been a part of and embraced within the Red Pipe stone quarry mentioned in Article VIII of the treaty between the United States of America and the Yancton tribe of Sioux or Dacotah Indians, concluded at Washington on the 19th day of April, A. D. 1858, and ratified by the Senate on the 26th day of February, A. D. 1859, and of and within that part of said quarry which the said Yancton Indians were on the dates aforesaid, and long prior
5 thereto, had been accustomed to frequent and use for the purpose of procuring stone for pipes.

That after the ratification of the treaty aforesaid, and on or about the first day of August, A. D. 1859, the complainant, your orator, pursuant to the stipulations thereof, caused to be surveyed and marked so much of said quarry as appeared to be necessary and proper for the purposes of the reservation provided for by said article, a diagram and the field notes of which survey were thereafter duly filed, returned, and recorded in and to the General Land Office, and the office of the surveyor-general in and for said State, and copies whereof were, under date of February 13th, A. D. 1860, duly transmitted by the Commissioner of the General Land Office to the surveyor-general of the United States in and for the State of Minnesota, with instructions to lay the same down on the map of the said State in said surveyer-general's office, and to respect the same when the lines of the public surveys should reach the locality by closing the same upon the reservation.

That the land hereinbefore described and the other land in its
6 vicinity was at the times hereinbefore mentioned unsurveyed, but that afterwards, for some reason to your orator unknown, the land heretofore particularly described was, in violation of the instructions aforesaid, surveyed with the other public lands in its vicinity.

That after the survey of said land as aforesaid the honorable Commissioner of the General Land Office, under date of July 9th, A. D. 1872, directed the surveyor-general aforesaid, by the aid of the field-notes and plat of the aforesaid survey of said quarry reservation on file in his office, to locate the said reservation upon the official plats in his office and to transmit authenticated copies of the same to the general and the local land office, and that should it be impossible so to locate the same from the data aforesaid a deputy should be dispatched to resurvey the same, so that it might be located and described upon the official plats and its boundaries respected in accordance with the terms of said treaty.

That the said surveyor-general, acting in pursuance of such instructions, thereupon & on the 29th and 30th days of July, A. D. 1872, caused
7 the said quarry reserve to be resurveyed and located the same immediately thereafter upon the official plats in his office.

That the boundaries of said reserve, as resurveyed as aforesaid, correspond to and were substantially identical with its boundaries as originally surveyed, and that all of the quarter-section of land, hereinbefore particularly described was embraced within the limits of said reserve according to each of said surveys thereof.

Your orator further shows that notwithstanding the reservation of said lands by the terms of said treaty and the subsequent survey thereof, and its express appropriation to the uses and purposes mentioned in said treaty, one August Cluesen, on the 15th day of July, A. D. 1871, at the local land office of the United States in and for the district in which said land was situate, was permitted by the land officers of the United States, for some reason to your orator unknown, unlawfully to locate upon the quarter section of land hereinbefore particularly described a certain piece of land scrip issued under the authority of the land laws of the United
8 States and known as Louisiana Agricultural College scrip, No. 349, R. & R. 269, and to enter the said land at said local land office with said scrip, and he did so enter the same, and that thereafter, and on or about the 15th day of May, A. D. 1874, a patent for said land was without authority of law, and in violation of the provisions of said treaty, issued to said Cluesen pursuant to said unlawful or pretended entry thereof.

That all the provisions of article eight of said treaty are still in full force; that said Yaneton Indians always have continued to and still do visit and procure stone from the said quarry and said particularly described tract, and have always desired and still do desire so to do; and that your orator's officers and agents in all that they did in connection with said pretended entry and patenting of said land acted without any authority of law and in violation of the provisions of said treaty.

Your orator further alleges that subsequently to the aforesaid entry of said land all of said Clausen's interests or pretended interests therein were by divers mesne conveyances sold and conveyed to the defendant, Herbert M. Carpenter, who is now the owner of the rights, if any, acquired
9 under said entry & patent, and claims to be the owner of the land in said patent described.

All of which acts and doings are contrary to equity and good conscience, and to the manifest wrong and injury of your orator.

In consideration whereof, and inasmuch as your orator can have proper and adequate relief only in this honorable court:

To the end therefore that the defendant may true, full, and perfect answer make to all and singular the matters hereinbefore charged (your orator hereby expressly waiving the necessity of such answer being under oath), and that it may be adjudged and decreed that the said patent and the entry on which the same was based may be vacated, and that your orator may have such other & further relief as may seem just in the premises, with its costs and disbursements:

May it please the court to grant unto your orator the writ of subpœna of the United States of America issuing out of and under the seal of this court, to be directed to the defendant hereinbefore named, commanding him by a certain day and under a certain penalty to be therein
10 named to be and appear in this honorable court, and then and there to answer in the premises, but not under oath; and further to stand

to, perform, and abide such further order, direction, and decree as may be made against him.

And your orator will ever pray.

CHARLES DEVENS,
Attorney-General.
WM. W. BILLSON,
U. S. Attorney, Dist. of Minn.

WM. W. BILLSON,
Of Counsel.

DISTRICT OF MINNESOTA, *ss:*

Wm. W. Billson, being first duly sworn, says he is the attorney of the United States in and for the said district; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

WM. W. BILLSON.

Subscribed & sworn to before me this 23d of February, A. D. 1880.

[COMM'R'S SEAL.] I. N. CARDOZO,
U. S. Comm'r, Dist. Minn.

11 And thereupon, upon application of said solicitors, a writ of subpœna was duly issued out of said court under the seal thereof, duly tested, and in the words and figures following, to wit:

12 UNITED STATES OF AMERICA,
District of Minnesota, ss:

The President of the United States of America to Herbert M. Carpenter, greeting:

You are hereby commanded to appear before our judges of our circuit court of the United States of America for the district of Minnesota, at Saint Paul, in said district, on the first Monday in the month of April next, to answer the bill of complaint of the United States of America this day filed in the clerk's office of said court in said Saint Paul, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Saint Paul aforesaid, this twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth year.

[U. S. CIRCUIT COURT SEAL.] H. E. MANN, *Clerk.*

MEMORANDUM.—The within-named defendant is notified that unless he enter his appearance in the clerk's office of said court, at Saint Paul aforesaid, on or before the day to which this writ is returnable, the complaint will be taken against him as confessed and a decree entered accordingly.

[SEAL OF COURT.] H. E. MANN, *Clerk.*

CHARLES DEVENS and WM. W. BILLSON,
Plaintiff's Solicitors.

13 (Indorsed:) No. Circuit court of the United States, district of Minnesota. The United States vs. Herbert M. Carpenter. Chancery subpœna. Returnable first Monday in April, A. D. 1880. Filed February 28, A. D. 1880. H. E. Mann, clerk. Chas. Devens and Wm. W. Billson, plaintiff's solicitors.

14 *Return.*

Which subpœna was afterwards duly returned to our said clerk's office endorsed by the marshal of the United States for the district of Minnesota as follows, viz:

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify that I served the annexed chancery subpœna on the therein-named defendant, Herbert M. Carpenter, personally, by handing to and leaving with him a true copy thereof, at Minneapolis, in said district, on the 28th day of February, 1880.

R. N. McLAREN,
U. S. Marshal,
By CHAS. REICHOW,
Deputy.

15 *Appearance of defendant.*

And afterwards, to wit, at rules held in the clerk's office of said court on the fifth day of March, A. D. 1880, the following proceeding, among others, was had, to wit:

THE UNITED STATES
vs.
HERBERT M. CARPENTER.

And now comes the defendant above named, by Messrs. John B. & W. H. Sanborn, his solicitors, on whose motion it is ordered that the appearance of said defendant be, and it is hereby, entered as of the rule day in April.

16 *Demurrer to bill.*

And afterwards, to wit, on the first day of May, 1880, came the defendant, by Messrs. John B. & W. H. Sanborn, and filed in the clerk's office of said court his demurrer to the plaintiff's bill of complaint in the words and figures following, to wit:

Circuit court of the United States, district of Minnesota.

THE UNITED STATES OF AMERICA
vs.
HERBERT M. CARPENTER. } Demurrer to bill.

The demurrer of Herbert M. Carpenter, defendant, to the bill of complaint of the United States of America, the plaintiff above named.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill and the whole thereof, and for cause of demurrer showeth that the said plaintiff has not, as appears by his said bill, made out any title or right to the relief thereby prayed. Wherefore, and for divers
17 other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demand the judgment of this court whether he shall be compelled to make any further or other answer to said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

HERBERT M. CARPENTER,
By JOHN B. & W. H. SANBORN,
His Solicitors.

I hereby certify that I am counsel for the defendant, Herbert M. Carpenter, defendant in the above cause, and that in my opinion the foregoing demurrer is well founded in point of law.

JOHN B. SANBORN,
Counsel.

DISTRICT OF MINNESOTA, *ss:*

Herbert M. Carpenter, being first duly sworn, deposes and says that the foregoing demurrer is interposed in good faith, and not for delay.

HERBERT M. CARPENTER.

Sworn to and subscribed before me this 26th day of May, A. D. 1880.

I. N. CARDOZO,
U. S. Comm'r, Dist. Minn.

18 *Demurrer set for hearing.*

And afterwards, to wit, at rules held in the clerk's office of said court on the 12th day of June, 1880, the following proceeding, among others, was had, to wit:

THE UNITED STATES)
vs.
HERBERT M. CARPENTER.)

Upon motion of Messrs. John B. & W. H. Sanborn, solicitors for defendant, it is ordered that the demurrer in this cause be, and it is hereby, set down for hearing at the term of said court to be held at the city of St. Paul, in said district, on the third Monday, being the 21st day of June, A. D. 1880, at the opening of court on that day, or as soon thereafter as counsel can be heard.

19 *Demurrer argued.*

And afterwards, to wit, at a stated term of said court begun and held at the city of Saint Paul, in said district, on the third Monday, being the 21st day of June, A. D. 1880, on the 22d day of June, A. D. 1880, the following proceeding, among others, was had, to wit:

THE UNITED STATES
vs.
HERBERT M. CARPENTER.

The demurrer of the defendant to the plaintiff's bill of complaint coming on to be heard was argued by J. B. Sanborn, esq., on the part of the defendant, and by W. W. Billson, on the part of the plaintiff, and submitted to the court, and by the court taken under advisement.

20 *Decree for defendant.*

And afterwards, to wit, at a stated term of said court begun and held at the city of St. Paul, in said district, on the third Monday in, being the 21st day of, June, A. D. 1880, on the 28th day of June, 1880, the following proceding, among others, was had, to wit:

THE UNITED STATES OF AMERICA
vs.
HERBERT M. CARPENTER.

The demurrer of the defendant to the plaintiff's bill of complaint having been heretofore argued by the counsel of the respective parties and submitted, and by the court taken under advisement:

Now, the court being fully advised in the premises, it is ordered that the said demurrer be, and it hereby is, sustained, and the plaintiff electing to stand by its bill, it is by the court ordered, adjudged, and decreed that the plaintiff's bill of complaint in this suit be, and the same is hereby, dismissed.

21 And afterwards, to wit, on the 6th day of January, A. D. 1880, came the complainant, by his said solicitors, and filed in the clerk's office of said court an affidavit of the value of the land in controversy, which affidavit is in the words and figures following, to wit:

United States circuit court, district of Minne-sota. In equity.

THE UNITED STATES, COMPL'T,
vs.
HERBERT M. CARPENTER, D'F'T.

DISTRICT OF MINNESOTA, *ss:*

Wm. W. Billson, of said district, being duly sworn, says he is attorney for the United States in and for said district; that the above-entitled cause, in which a decree for defendant has heretofore been rendered by the court, is a suit in equity for the cancellation of the patent heretofore issued by the President of the United States for a certain tract of land situate in Pipestone County, in said district of Minnesota, to wit, the Southwest quarter of Section one (1) of Township one hundred and six (106) North of Range 46 West, embracing what is known as the Red
22 Pipestone quarry; that neither the bill of complaint nor any other pleading or record in said cause discloses or alleges the value of the said land so in controversy in this cause; but affiant says that the said

land, owing to the deposit of pipestone underlying the same, is really of great value, to wit, of the reasonable worth and value of more than six thousand dollars.

Further affiant saith not, save that he makes this affidavit in order that the amount in dispute in this cause not being disclosed by the pleadings may thus be made to appear.

WM. W. BILLSON.

Subscribed and sworn to before me this 6th day of January, A. D. 1881.

[NOTARIAL SEAL.] I. N. CARDOZO,
U. S. Com'r, Dist. Minn.

23 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, APPELLANT,
vs.
HERBERT M. CARPENTER, RESPONDENT.

To the honorable the Supreme Court of the United States:

The appeal of the United States of America, the above-named complainant and appellant, respectfully showeth:

That upon the 23d day of February, A. D. 1880, the above-named complainant filed its bill in the circuit court of the United States for the district of Minnesota, against the above-named defendant and respondent, alleging in substance that the tract of land situate in the present county of Pipestone, in the State of Minnesota, to wit, the Southwest quarter of Section one (1), in Township 106, Range 46 West, was, on the 19th day of April, A. D. 1858, and for a long time prior thereto had been and ever since has been, a part of the Red Pipe-stone quarry mentioned in Article VIII of the treaty between the United of America and the Yancton
24 tribe of Sioux Indians, concluded at Washington April 19th, A. D. 1858, and ratified by the Senate Feb'y 26, 1859, and of and within that part of said quarry which the said Indians were on the dates aforesaid, and long prior thereto had been accustomed to frequent and use for the purpose of procuring stone for pipes.

That after the ratification of said treaty, and long prior to the entry of said land as hereinafter mentioned, the said United States, pursuant to the stipulations of said treaty, caused to be marked off and surveyed so much of said quarry as appeared to be necessary and proper for the purposes of the reservation provided for by said article and caused due notes, diagrams, and records of such reservation to be made and filed in the office of the Commissioner of the General Land Office at Washington, and the United States surveyor-general for the district of Minnesota the public lands adjacent to such tract, being at that time unsurveyed, and that the quarter section of land hereinbefore particularly described was embraced within and was a part of the land so surveyed, marked off, set aside, and appro-
25 priated for the purposes mentioned in said treaty. That long after all the aforesaid proceedings and after the said tract had been appropriated, surveyed, marked off, and reserved as aforesaid, to wit, on the 15th day of May, A. D. 1874, a patent for the aforesaid quarter section of

land was without authority of law and in violation of the provisions of said treaty issued to one August Clausen by virtue of and pursuant to an entry thereof, with certain agricultural college scrip, made by said Clausen, July 15th, A. D. 1871, long after the aforesaid marking off, survey, appropriation, & reservation of said tract as hereinbefore mentioned. That said Yancton Indians always have continued to and still do visit and procure stone from the said quarry and said particularly described tract, and have always desired and still desire so to do.

That through mesne conveyances the defendant, Herbert M. Carpenter, has acquired all the rights and interests, if any, which the said Clausen derived in said property by virtue of said entry & patent, and now claims to be the owner thereof. And the said United States, by its said
26 bill, prayed that it might be adjudged and decreed that the said patent and the entry on which the same was based might be vacated, and that it might have such other and further relief as should seem just in the premises.

That thereafter, and on the first day of May, A. D. 1880, the said defendant and respondent, Carpenter, filed in said circuit court his demurrer to the said bill of complaint, and assigned for cause of demurrer that the complainant & appellant aforesaid had not by the averments of its said bill made out any title or right to the relief thereby prayed.

That the said cause came on to be heard on the said bill and demurrer at the general June term of said circuit court, A. D. 1880, and the said circuit court upon due consideration thereof sustained the said demurrer, and made and caused to be entered upon its records, June 28th, A. D. 1880, a final decree dismissing the said bill out of court.

Wherefore this appellant appeals from the whole of said decree
27 of said circuit court of the United States, and respectfully prays that the decree of said circuit court, and the bill, answer, pleadings, & proceedings in the said cause may be sent to the Supreme Court without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed, and a decree made canceling the entry and patent aforesaid with costs, or such other decree as to the said Supreme Court shall seem just.

Dated January 6, A. D. 1880.

CHARLES DEVENS,
Attorney-General.
WM. W. BILLSON,
U. S. Dist. Att'y.

28 And afterwards, to wit, at the general December term of said court, A. D. 1880, and on the 6th day of January, A. D. 1881, the following proceeding among others:

THE UNITED STATES OF AMERICA
vs.
HERBERT M. CARPENTER.

The plaintiff in this cause, by Wm. W. Billson, esq., its solicitor, comes and moves for an order allowing an appeal from the decree in this cause

to the Supreme Court of the United States; whereupon it is by the court ordered that such appeal be, and the same is hereby, allowed.

29 UNITED STATES OF AMERICA, .
District of Minnesota, ss:

Circuit court of the United States.

I, H. E. Mann, clerk of said circuit court, do hereby certify and return to the honorable the Supreme Court of the United States that the foregoing, consisting of 29 pages, numbered consecutively from 1 to 29, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final decree, and all other proceedings in said cause, and of the whole thereof, *and of the whole thereof*, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Saint Paul, in the district of Minnesota, this 30th day of August, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] H. E. MANN, *Clerk.*

(Indorsed:) United States circuit court, district of Minnesota. United States of America vs. Herbert M. Carpenter. Return to Supreme Court.

(Indorsement on cover:) No. 292. The United States, appellant, vs. Herbert M. Carpenter. Minnesota C. C. U. S. Filed September 16, 1881.

111-347

SUPREME COURT, U.S.
FILED
MAR 28 1884
JAMES F. MCKENNEY, CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
HERBERT M. CARPENTER. } No. 292.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES, APPELLANT,
vs.
HERBERT M. CARPENTER.
No. 292.

BRIEF FOR THE UNITED STATES.

This is a bill filed by the United States to have vacated a patent covering a portion of the Red Pipe stone quarry, in the county of Pipestone, Minnesota.

The case presented by the bill (pp. 1–4) is thus:

By Article VIII of the treaty between the United States and the Yankton tribe of Sioux or Dakotah Indians, ratified the 26th February, 1859, it is stipulated as follows, touching the said quarry:

> "The said Yankton Indians shall be secured in the free and unrestricted use of the red pipe stone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulate and agree to cause to be surveyed and marked so much thereof as shall be necessary and proper for that purpose, and retain the same, and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire." (Rev. of Ind. Treaties, pp. 860, 861.)

By way of carrying into effect this provision of the treaty, the Government, on or about the 1st August, 1859, caused to be surveyed and marked so much of the said quarry as appeared to be necessary and proper for the purposes of the reservation provided for, and a diagram and the field-notes of said survey were duly lodged in the General Land Office and the office of the surveyor-general of Minnesota, and in February, 1860, copies of the said diagram and field-notes were transmitted by the Commissioner of the General Land Office to the surveyor-general of the United States for Minnesota "with instructions to lay the same down on the map of said State, in said surveyor-general's office, and to respect the same when the lines of the public surveys should reach the locality by closing the same upon the reservation."

At the time this reservation was thus defined both it and the land circumjacent remained unsurveyed, but afterwards, for some reason unexplained, the reservation in question was surveyed along with the land situate around it.

On the 9th July, 1872, and after the survey, the Commissioner of the General Land Office directed the surveyor-general to locate the said reservation on the official plats in his office from the field-notes and diagram of the original survey of the reservation, and transmit authenticated copies to the General and local land offices, or if it should be impossible to locate the reservation from the data at command to order a resurvey.

Accordingly, in the same month of July, 1872, the surveyor-general caused a resurvey of the quarry reserve and located the same immediately thereafter upon the official plats in his office. The boundaries of the reserve, accord-

ing to the resurvey, are substantially coincident with those of the original survey.

But notwithstanding the treaty and the proceedings to carry out Article VIII, one August Cluensen, on the 15th July, 1871, was permitted by the land officers of the district in which the said reservation lies to locate on a part of it certain scrip issued by the authority of the United States, and to enter the said land at said land office with said scrip, and afterwards, to wit, on the 15th May, 1874, a patent for said land was issued to said Cluensen pursuant to said entry.

The bill avers that all the provisions of said treaty are still in full force; that the said Indians have always been accustomed to visit and procure stone from the said quarry, and still desire to resort thither for that purpose; and that the said proceedings of entering the said land and issuing a patent for the same are in violation of the treaty and without authority of law.

Clumsen is no longer owner of said pretended interest in the said reserve, but the same has by divers mesne conveyances come to the defendant, Herbert M. Carpenter.

The bill prays that the patent, and the entry on which it rests may be vacated, and for relief generally.

The defendant demurred to the bill for the want of equity. (R., pp. 5, 6.)

The court sustained the demurrer and dismissed the bill. (R., p. 7.)

GROUND OF APPEAL.

The demurrer should have been overruled and the bill sustained.

ARGUMENT.

The article of the treaty reserving to the Yankton Indians "the free and unrestricted use" of the quarry or so much as they have been accustomed to use, and binding the United States to set apart for that purpose so much of the quarry as shall be necessary and proper by metes and bounds, is, *ad hoc*, the supreme law of the land. It is not pretended that Congress has nullified this provision of the treaty by subsequent legislation. It follows, therefore, that the proceedings of the land officers in allowing the land in question to be entered, and in issuing a patent therefor, were null and void, as being in direct violation of an explicit declaration of the law of the land.

If the right of the Indians had been merely movable and floating at the time the entry was made the entry would have been void, because everybody making entries as to any part of said quarry would do so with notice that the Indians had an indefeasible usufruct in such part of the quarry as the United States might designate for that purpose.

But the right of the Indians was not a floating one, for it is established that very soon after the ratification of the treaty and very nearly two years before the pretended entry by Chuensen the United States had performed its treaty obligation in this behalf by having a part of the said quarry marked off by a survey as a reserve for the use and benefit of the said Indians. This requirement of the treaty being, therefore, fully gratified, the usufructuary interest of the Indians became at once fixed and determinate. Was it, then, possible for the Land Office, by design or mistake, to de-

stroy this vested right of the Indians? Did the unauthorized act of surveying the reserve, and the attempt to throw it open to settlers and purchasers, have the effect of nullifying the treaty? It is not to be lost sight of that this case comes up on the admissions, by the demurrer, that in the year the treaty was ratified, and long before Cluensen's pretended entry, the Government had a part of the quarry laid off as a reservation by a survey, the field-notes and a diagram of which were made of record in the General Land Office and in the offices of the surveyor-general of the State and the United States surveyor-general for the State, with instructions to the latter to lay the same down on the map of the State in his office, "and to respect the same when the lines of the public surveys should reach the locality by closing the same upon the reservation."

But supposing the usufruct of the Indians to have been indeterminate when the land was entered, the argument for the demurrer is not helped, for this court has repeatedly held with reference to grants to railroads of land on each side of the line of a route to be afterwards determined, that so soon as such line was fixed the right of the railroad to the land vested by relation from the date of the grant, overriding all mesne rights not excepted from the operation of the grant. (Railroad Co. *v.* Baldwin, 103 U. S., 426, and cases therein cited.) Certainly an act of Congress is no more potent to work such results than a treaty.

But it may be asked what interest has the United States in this question? We answer that it most intimately concerns the United States that it should be relieved from the consequences and the reproach of violating a treaty obli-

gation by having the improvident and ill-advised acts of its officers in contravention of the treaty judicially ascertained and declared to be null and void. If the United States has not in this case a *locus standi in judicio*, then a great wrong must go unredressed, for these Indians cannot sue in the Federal courts. (Cherokee Nation *vs.* Georgia, 5 Pet., 1.)

It is respectfully submitted that the decree must be reversed.

WM. A. MAURY,
Assistant Attorney-General.

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OFFICE SUPREME COURT U.S.
FILED
MAR 20 1894
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES,
Appellant,

v.

HERBERT M. CARPENTER,
Appellee.

No. 202.

BRIEF OF APPELLEE—STATEMENT OF THE CASE.

JOHN B. SANBORN,
Counsel for Appellee.

JOHN B. & W. H. SANBORN,
Attorneys for Appellee.

Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES,
Appellant,
v.
HERBERT M. CARPENTER,
Appellee.

No. 292.

BRIEF OF APPELLEE—STATEMENT OF THE CASE.

Bill in equity brought by the United States to vacate and set aside the patent issued by the appellees to one Clauson, on the fifteenth day of May, A. D. 1874, for the southwest quarter of section one, in township one hundred and six, of range forty-six. Clauson's title, by mesne conveyances, had been vested in the appellee, and the appellee demurs to the appellant's bill.

The eighth article of the treaty between the United States and the Yankton band of Sioux Indians, concluded in 1858 (11 Statutes at Large, 746), is in the following words, viz.:

"The said Yankton Indians shall be secure in the free "and unrestricted use of *the Red Pipe-stone quarry, or as* "*much thereof* as they have been accustomed to fre- "quent and use for the purpose of procuring stone for "pipes; and the United States hereby stipulate and agree "to cause to be surveyed and marked *so much thereof as* "*shall be necessary and proper* for that purpose, and retain "*the same* and keep it open and free to the Indians to visit "and procure stones for pipes so long as they shall desire."

The appellant charges in his bill that a survey of so much of said quarry as appeared to be necessary and proper for the purposes of the reservation provided for in said article, were indicated by a diagram and field notes of a survey which complainant caused to be filed, returned and recorded in the general land office and the office of the surveyor-general of the United States, in and for the said State of Minnesota, and that copies thereof were, under date of February 13, 1860, transmitted by the commissioner of the general land office to the surveyor-general of the United States, in and for the State of Minnesota, with instructions to lay the same down on the map of the said state in said surveyor-general's office, and respect the same when the lines of the public surveys, should reach the locality by closing the same upon the reservation. That at the date aforesaid the public lands in this section were all unsurveyed, and when surveyed, the tract in controversy was surveyed, in violation of said instructions, with the other public lands in the vicinity; and that on the fifteenth day of July, A. D. 1871, August Clauson entered said tract of land with Louisiana Agricultural College scrip at the local land office of the land district in which said land was situated, and said entry passed to patent May 15, A. D. 1874, and draws the conclusion that this patent was issued without authority of law; that after the said tract of land

was so entered and sold, and on July 9, 1872, the commissioner of the general land office directed the surveyor-general of Minnesota to locate said reservation on the official plats, and that he did so on the twenty-ninth and thirtieth days of July, A. D. 1872, more than one year after the entry and sale of the same, and that the last survey includes the first, and concludes that what the officers and agents of the government did in connection with the entry and patenting of said land, was without authority of law; and that all they did in connection with surveying and marking it as a reservation, was with the authority of law, and charges that the Indians still visit the quarry and obtain stone therefrom for pipes, and that all the interest obtained by Clauson by his entry and patent were by divers mesne conveyances vested in the defendant and appellee, and asks that the entry and patent be vacated and for general relief.

The appellee interposed a general demurrer and the circuit court, upon argument and consideration, sustained the demurrer and the complainant appealed to this court.

POINTS AND AUTHORITIES.

I.

The Indian title to the land in controversy was extinguished by the treaty of July 3, 1851 (10 Statutes at Large, 949). Article two is in the following words:

"The said See-see-toan and Wah-pay-toan, bands of Da-
"kota or Sioux Indians, agree to cede, and do hereby cede,
"sell and relinquish to the United States all their lands in
"the State of Iowa, and also all their lands in the Terri-
"tory of Minnesota, lying east of the following line, to-wit:
"Beginning at the junction of the Buffalo river with the

"Red River of the North; thence along said western bank "of said Red River of the North to the mouth of the Sioux "Wood river; thence along the western bank of said Sioux "Wood river to Lake Traverse; thence along the western "shore of said lake to the southern extremity thereof; "thence in a direct line to the junction of Kampeska Lake "with the Tchan-kas-an-data or Sioux river; thence along "the western bank of said river to its point of intersection "with the northern line of the State of Iowa; including all "the islands in said rivers and lakes."

In the report of the war department in December, 1858, page ninety-eight, the following language occurs:

5. "Jhanktonwans (Yanktons) 'village at the end.' These "are sometimes called Wichiyeta, meaning first nation. "They are found at the mouth of the Big Sioux, *and be-* "*tween it and the Missouri river* as high up as Fort Lookout, "and on the opposite bank of the Missouri. They are "supposed to number three hundred and sixty lodges. "Contact with the whites has considerably degenerated "them, and their distance from the present buffalo ranges "renders them comparatively poor. *A treaty has been made* "*with them by which they have ceded most of their land to* "*the United States.*"

Hence the Yankton band never did have the right of possession of said quarry to cede to the United States, and all of the Indian title thereof was formerly in the See-see-toan and Wah-pay-toan bands of that nation, and was ceded by them, in and by the treaty of July 3, 1851, to the United States.

II.

All lands belonging to the United States to which the Indian title has been extinguished, are subject to pre-emption and sale as provided by law. Sections 2257 and 2258 Re-

vised Statutes, as far as applicable to this case, are as follows, viz.:

SEC. 2257. All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption under the conditions, restrictions and stipulations provided by law.

SEC. 2258. The following classes of lands, unless otherwise specially provided by law, shall not be subject to the rights of pre-emption, to-wit:

First—Lands included in any reservation by any treaty, law or proclamation of the president for any purpose.

III.

The charge in the bill that said land was entered with Agricultural College scrip, taken in connection with facts of which the court must take judicial notice, viz.: That the land had not been proclaimed for sale by the president, and hence not subject to private entry, is equivalent in legal effect to a charge that it was entered by pre-emption with Agricultural College scrip. Section 2278 of the Revised Statutes is in the following words, viz.:

SEC. 2278. Agricultural College scrip issued to any state under the act approved July 2, 1862, or acts amendatory thereof, shall be received from actual settlers in payment of pre-emption claims in the same manner and to the same extent as authorized in case of military bounty land warrants by the preceding section.

The preceding section provides that all warrants for military bounty lands, issued under the laws of the United States, shall be received in payment of pre-emption claims at one dollar and twenty-five cents per acre.

The bill therefore shows that the tract of lands in controversy was surveyed, sold, and payment therefor received

in the ordinary course of the disposition of the public lands.

IV.

The eighth article of the treaty of 1858, in the following words—"The said Yankton Indians shall be secure in the free "and unrestricted use of *the Red Pipe-stone quarry, or as much "thereof* as they have been accustomed to frequent and use "for the purpose of procuring stone for pipes; and the "United States hereby stipulate and agree to cause to be sur- "veyed and marked *so much thereof as shall be necessary and "proper* for that purpose, and retain *the same* and keep it open "and free to the Indians to visit and procure stones for pipes "so long as they shall desire." (11 Statutes at Large, 746)—reserved no land, but, if it has any effect, confers a personal or tribal right upon the Yankton band of Sioux to visit the Red Pipe-stone quarry and get stone for pipes, and imposed an obligation on the part of the United States to survey the same.

There was no reservation of the tract of land in controversy, nor any tract or piece of land. Article eight is no more nor less than an agreement on the part of the United States to cause to be surveyed and marked so much of the Red Pipe-stone quarry as should be necessary and proper for the Indians to frequent and use for the purpose of procuring stones for pipes, and to retain that portion and keep it open and free to the Indians to visit so long as they should desire.

This was not a reservation of any tract of land, and did not make a reservation where there was none before. It was simply an agreement that the Indians should have the right to visit and obtain stones for pipes from the Red Pipe-stone quarry, a small hole in the ground. The agreement did not relate to any particular subdivision of government land, or any specific portion of the same; and if it had any present force upon land, it was upon no particular land and was a

float; and no one purchasing of the government in good faith for a valuable consideration, before the particular tract to which the agreement related was designated, could be prejudiced thereby. The bill shows that the tract of land in controversy was purchased and paid for under the pre-emption laws upon the plats of the public surveys duly made, returned and filed, showing no reservation and nothing to separate it or designate it from the main body of the surveyed public lands.

If there was any reservation, it was of a natural object only, and not of land including a natural object.

V.

August Clauson had pre-empted and paid for the same in the manner provided by law, on the fifteenth day of July, 1871.

The acts of the complainant, done for the purpose of constituting the tract in controversy a reservation, were done after the thirtieth day of July, A. D. 1872.

The bill substantially charges that neither of the three conditions that preclude the public land from sale by pre-emption or otherwise, existed when Clauson made his settlement and entry, viz.:

First—An unextinguished Indian title.

Second—Reservation by treaty or act of Congress.

Third—Reservation by proclamation of the President.

Hence the settlement entry and patent are valid.

VI.

There is no charge in the bill that the obligation of the United States, if any exists, to reserve a sufficient portion of said quarry to provide the Indians stone for pipes, cannot be as well fulfilled from other portions of the quarry. The

formation is a plateau two miles long and a half mile wide, lying at the base of a ridge of granite.

Vol. 2 Catlin's North American Indians, pp 201, 202.

The complainant must at least be required to charge that by reason of the premises the obligations of the treaty cannot be fulfilled.

VII.

The bill should show, but does not, that the Yankton Indians have been deprived of their right to visit the Red Pipe-stone quarry, and complain of the violation of this article of their treaty, and that the complainant has brought this bill for their benefit. The Indians, however, are not complaining. Nothing in the bill shows that they are deprived of any right or are seeking any rights in a court of equity, or that the complainant is seeking to recover the legal title to this land to enable it more fully to execute the said provisions of said treaty.

A enters into a contract with B to sell him a piece of land at a future time, and afterward, in violation of the contract, sells the same land to C. Of this B does not complain. Will a court of equity entertain a bill at the suit of A to set aside the conveyance to C and vest the title in A? This is a legal absurdity. It will be time for a court of equity to exercise its powers when the Yankton Indians complain that they are deprived of treaty rights by citizens of the United States, combining together to defraud them of their reservation and rights. The bill alleges, it is true, that the Yankton Indians desire to get stone at this quarry. It does not allege that the defendant or any one else is depriving them of this right. Nor does it show any relation between the United States and said Indians that either requires or permits the complainant to bring this bill.

If the tract of land in controversy is a reservation, it is such at the pleasure and will of the Indians. This is not

permitted. When land is once segregated from the main body and reserved for a particular use, it will remain a reservation and not be disposed of except under a special act of Congress.

Apply the rule contended for here, and the Yankton Indians and not Congress can say when the Red Pipe-stone quarry can be sold, and this is equivalent to the right to say to whom it shall be sold. If this could constitute a reservation it would be void as against public policy. The policy of our government and laws will not permit any Indians or Indian tribes to decide when or to whom any portion of the public domain shall be sold or made subject to sale.

If the Yankton Indians had desired a tract of land that should include the Red Pipe-stone quarry, reserved for them in lieu of some portion of that ceded by the treaty, and the United States had consented to such a reservation, then such a reservation would have been formed and made in and by the treaty, a tract one mile or a half mile or a quarter mile square, including the Red Pipe-stone quarry, would have been set off and reserved for the perpetual use of the Indians. But no reservation of land was made in any form, and said land remained subject to sale under the general laws relating to the sale of the public lands.

VIII.

The following points are established beyond controversy by the allegations of the bill and the treaties and laws of the United States, of which the court must take judicial notice, and seem to us conclusive of this case.

First—That the fee to the land in controversy has been in the United States since the date of the Louisiana purchase to the sale to August Clauson in 1871, subject only to the Indian right of occupancy.

"The counsel for the appellants attempt to take this case "out of the general rule, because their equity, they say, "commenced before the legal title of the respondent was "consummated, and their pre-existing rights were impaired "by this intrusion into the military lands reserved for the "Virginia and continental troops. The officer, under whom "they claim, had a right to elect among all the vacant lands "in the reserved territory, and his right of election was nar- "rowed by the respondent's patent."

"This is a general indefinite equity, not applicable to one "tract of land more than another (not applicable to one por- "tion of the Red Pipe-stone quarry more than another), and "which has perhaps never been allowed under circumstances "resembling those which exist in the present case. It is a "*scintilla juris* which we should find much difficulty in sup- "porting against a complete legal title, founded on an origin- "al claim of equal merit of the same character. When it is "recollected that in their origin these claims stood equal, "and were equally capable of appropriating the same land, "it may well be urged that the rights of the state officers," etc. . . . "This right of election, which the ap- "pellants now set up against a complete legal title, originat- "ed in them and was common to both parties. The equity "of the one cannot be so inferior to that of the other as to "justify the court in considering the patent of the one as an "absolute nullity in favor of the other who has attempted to "appropriate the same land after such patent has been is- "sued."

This is a stronger case, for here the vendors attempt to appropriate by way of reservation to themselves, after sale and patent, lawfully made and issued, without complaint or demand of the party, which, if any one, is entitled to the beneficial use.

In the case of Frisbie *v.* Whitney, 9 Wallace 187, this

court quoted with approval and favor the language of Attorney-General Speed in the matter of Soscal Ranch, as follows: "The land continues subject to the absolute "disposing power of Congress until the settler has made the "required proof of settlement and improvement, and has "paid the requisite purchase money." . . . "We are "satisfied that this is a sound construction of the pre-emp- "tion laws on the question now under consideration."

In that case, the court further held that to enable a party to assert successfully an equitable interest or title against a legal title acquired by other persons, he must show that he had acquired a *prior vested right* in the just sense of that term. He must show a *legal right* to preference of purchase over the other as the law stood when the land officers decided the case, and that it is the disregard of the law by the land officers which this court, and the courts, will correct; so that if the treaty did not of its own force reserve this land, it was not reserved when entered and paid for. In law it is true — perhaps too true — that intentions and purposes do not take the place of acts.

In the Yosemite Valley Case, 15 Wallace, p. 87, in speaking of the case of Frisbie *v.* Whitney, this court says: "And "it was there held that, under the pre-emption laws, mere "occupation and improvement of any portion of the public "lands of the United States, with a view to pre-emption, do "not confer upon the settler any right in the land occupied "*as against the United States*, or impair in any respect the power "of Congress to dispose of the land in any way it may seem "proper; and that the power of regulation and disposition "conferred upon Congress by the constitution, *only ceases* "*when all the preliminary acts prescribed by those laws for the* "*acquisition of the title, including the payment of the price of* "*the land, have been performed by the settler.*" Of course, what is true of Congress, must be true of all the executive

officers whose powers pertaining to the public lands are derived from Congress. And hence the power to make a reservation, or to survey and mark it on the plat of the public lands, can only be exercised while the land belongs to the United States. When it has been entered and paid for, all acts by executive officers pertaining to the same, if committed on the land, are trespasses, and, if off the land, are nullities.

It stands demonstrated that, upon the face of the bill, the appellee had a vested right in and to this land long before the appellant reserved the same, if from the allegations it can be found that a reservation has ever been made, that would have been valid if the land had belonged to the United States at the time; and it is also demonstrated that there was no vested right in or to this tract of land in the Yankton Indians when the United States sold the same, and that the same was not reserved to the United States by any law, treaty or proclamation of the president.

The order and judgment of the court below sustaining the demurrer should be affirmed, and the bill of the appellant dismissed.

JOHN B. SANBORN,

Counsel for Appellee.

JOHN B. & W. H. SANBORN,

Attorneys for Appellee.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 291.

ROBERT C. CHAMBERS, LATHROP DUNN, ELIZA NELSON, AND NELSON BOUKOFSKY,

APPELLANTS,

vs.

JAMES HARRINGTON, GEORGE GOSS ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 14, 1881.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 291.

ROBERT C. CHAMBERS, LATHROP DUNN, ELIZA NELSON, AND NELSON BOUKOFSKY,

APPELLANTS,

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APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a SUREME COURT, UTAH TERRITORY.

JAMES HARRINGTON *et al.*, Respondents,
vs.
ROBERT C. CHAMBERS *et al.*, Appellants.

Transcript. Bennett & Harkness, attorneys for appellants. Sutherland & McBride, attorneys for respondents. Filed May 27, 1881. E. T. Sprague, clerk of supreme court.

1 In the District Court for the Third Judicial District, of the Territory of Utah.

JAMES HARRINGTON, GEORGE GOSS, EZRA RUST, ANDREW HAY, JAMES J. O'REILLY, JOSEPH GORLINSKI, AND JABEZ G. SUTHERLAND, Plaintiffs,
vs.
ROBERT C. CHAMBERS, LATHROP DUNN, ELIZA NELSON, AND NELSON BOUKOFSKY, Defendants.

Said plaintiffs complain against said defendants and allege:

That they are respectively citizens of the United States, and the owners as tenant in common, of that certain mine and mining claim situate in Uintah Mining district, in the county of Summit, and Territory of Utah, called, known, located, and recorded as the Parley's Park lode or mining claim; that at the time of
2 its location, and when recorded as hereinafter stated, the land and premises embraced in the said Parley's Park claim were a part of the public mineral lands of the United States, and were entirely vacant and unoccupied and not claimed by any person as mining ground or otherwise; that while the same was so vacant and unoccupied and not claimed, on the 19th day of July, 1872, said plaintiff, James Harrington, and one Robert Paxton and one C. C. Perkins, each of whom was a citizen of the United States, entered upon and explored the land and premises embraced in the said Parley's Park mining claim, as hereinafter particularly described, and bounded, and discovered, and being the first to discover, took possession and opened in said property and premises, a lead, lode, or ledge of mineral bearing rock in place, carrying silver and other valuable metals, and then and there located the same as a mining claim; that for this purpose the said Harrington, Paxton and Perkins, posted thereon at the point of discovery, a written notice of location of said claim upon a monument there erected, which notice contained the names of said locators as such, a description of said claim, where situate, its direction, dimensions, and name; that it was so located by the name of the Parley's Park lode, embracing the surface ground and premises hereinafter described and bounded as the Parley's Park lode or mining claim; that said locators immediately after posting said notice of location, as aforesaid, distinctly marked the boundaries of said location on

the ground and surface, and set visible and conspicuous stakes at the corners thereof; that said locators did the work required by law to the amount of one hundred dollars and more, in sinking a shaft at the point of discovery on said mining claim, and otherwise developing and improving the same agreeably to the mining laws of said Uintah Mining District and the laws of the United States; that after-
3 wards, to wit, on the 9th day of August, 1872, said locators caused a notice of said location of said Parley's Park mining claim to be duly recorded in the proper mining records of said Uintah Mining District, a copy of which notice so posted and recorded is hereto attached and made part of this complaint and marked exhibit "A." That from the date of said discovery and location of said Parley's Park claim, continuously up to the present time, the said locators and their vendees and successors in interest have occupied said property, lode and mining claim, working, developing and improving the same; that as to the discovery, location, marking the boundaries on the ground, posting and recording notice thereof, possession, and doing the work annually required to be done thereon, they have fully complied with all laws in such case made and provided, both of the United States and of said district; that they have occupied and worked the said mining claim in accordance with the mining customs, rules and regulations which have been and now are in force in said district, and have expended in such work on said mining claim for the improvement and development thereof the sum of six thousand dollars, and more; that said plaintiffs are now in the actual possession of said mining claim and own the same, except as against the paramount title of the United States, the said James Harrington as one of the locators, and the other said plaintiffs by and through a regular chain of valid mesne conveyances from said locators.

Said plaintiffs further allege that in March, 1876, they caused the said Parley's Park mining claim to be officially surveyed by a deputy United States mineral surveyor, preliminary to an application for a patent therefor. That said survey has been approved by the surveyor-general of the United States for the Territory of Utah, said application for patent made, which is now pend-
4 ing; that the following is a correct description of said Parley's Park mining claim, so located, marked on the ground, recorded, worked, occupied and surveyed for a patent, that is to say the surface boundaries thereof, to wit: Beginning at the discovery monument and shaft of said Parley's Park mining claim, thence along the center line of said claim south 74° 2′ east seven hundred and fifty feet to a point in the center of the eastern end line of said claim; thence north 25° 58′ east one hundred feet to post No. 1; thence south 25° 58′ west two hundred feet to post No. 2; thence north 74° 2′ west five hundred and eighty-eight feet to post No. 3; thence north 11° east one hundred and six feet to corner No. 4, from which witness post to said corner bears south 11° west five and a half feet distant, and from said corner No. 4 the United

States mineral monument No. 1 bears south 56° east one hundred and eighty feet distant; thence north 79° west seven hundred and thirty-two feet to post No. 5; thence north 64° west one hundred and sixty feet to corner No. 6, from which witness post to said corner bears north 25° 58′ east twenty-nine feet distant; thence along the western end line of said Parley's Park mining claim north 25° 58′ east one hundred and twenty-nine feet to post No. 7; thence along the northern boundary of said claim, south 74° 2′ east fifteen hundred feet to post No. 1, containing five and $\frac{33}{100}$ acres superficial area.

The plaintiff further alleges that said defendants under color of a certain false, fraudulent and pretended claim and location, called the Swisserland, or Switzerland claim, pretended to be entitled to the possession of a portion of said Parley's Park mining claim, and said defendants claim an estate or interest therein adverse to said plaintiffs; that on the eighth day of June, 1876, said defendants filed in the United States land office, at Salt Lake City, Utah, in the district of lands wherein said claims are situated, an application
5 for a patent from the United States for said pretended Swisserland, or Switzerland claim, and embraced in said application a portion of said Parley's Park claim. That on the 7th day of August, 1876, these plaintiffs filed in said land office their adverse claim and protest against said defendant's application, that said adverse claim and protest was duly verified, and filed therewith was an abstract of title showing said plaintiffs to be the owners of said Parley's Park claim, and a plat thereof showing the area in conflict, and otherwise complied with the statutes of the United States, in such case made and provided, to entitle the plaintiffs as adverse claimants and protestants to a suspension of said application; that the said Parley's Park mining claim, as hereinbefore described, and the area and portion thereof embraced in said defendants' application for a patent for said pretended Switzerland or Swisserland claim, and to which said defendants set up a claim adverse to said plaintiffs, are shown by a diagram or map hereto attached and made a part of this complaint, and marked exhibit "B;" that the portion of said Parley's Park claim so claimed by said defendants, is represented on said map by the area colored yellow, and bounded by the letters A, B, C, and D, and more fully described as follows, to wit: Beginning at post No. 2 of said Parley's Park survey; thence north 74° 2′ west five hundred and eighty-eight feet to post No. 3 of the survey of said Parley's Park claim; thence north 11° east one hundred and six feet to corner No. 4 of said survey; thence south 69° 36′ east six hundred and eight feet to the eastern end line of said Parley's Park claim; thence south 25° 58′ west along the said line nine feet to post No. 2 of said claim, the place of beginning, containing one and $\frac{12}{100}$ acres of superficial area.

The plaintiffs further allege that the claim of said defend-
6 ants to the premises last above described is entirely without

foundation; the plaintiffs aver that the said pretended Swisserland or Switzerland claim has no validity.

Wherefore said plaintiffs pray that they may as against said defendants, and all persons claiming, or to claim, by, under or through them, or either of them, be adjudged to be the owners of said Parley's Park claim, as hereinbefore described, and especially of the said area and mining ground in conflict, and of said Parley's Park claim throughout its entire extent, except as against the United States, and rightfully entitled to the possession thereof; and that the defendants' adverse claim thereto, or any part thereof, is wholly void, and they be forever barred from asserting any right or claim to, or interest in, the same; and that the plaintiffs may have such further or such other decree, order or relief in the premises, as they shall be found entitled to, and as shall be agreeable to equity.

J. G. SUTHERLAND,
Plaintiff's Attorney.

Duly verified.

(Exhibits "A" and "B" referred to in the foregoing complaint may be found in another part of the transcript.)

Answer.

Title of Court and Cause.

Now come the above-named defendants, and answering plaintiffs' complaint herein, deny:

That the plaintiffs aforesaid, or either, or any of them, are
7 the owners, as tenants in common or otherwise, of that certain or any mine or mining claim situate in Uintah Mining District, Summit county, Utah Territory, called, known, located, or recorded as the Parley's Park lobe or mining claim.

They deny that on the 19th day of July, 1872, or at any time, James Harrington and one Robert Paxton and one C. C. Perkins, or any one or more of them, discovered or took possession of a lead, lode, or ledge of mineral bearing rock in place, carrying silver or other valuable metals, or any mineral whatsoever, embraced within said pretended Parley's Park claim. They deny that said Harrington or Paxton or Perkins, or any or all of them, after posting upon their pretended discovery point a notice of location, distinctly, or in any way marked the boundaries of such location, on the ground or surface, or set visible or conspicuous, or any stakes at the corners thereof.

They deny that said pretended locators did the work required by law to the amount of one hundred dollars or more, or to any amount exceeding the sum of fifteen dollars, in sinking a shaft at the point of discovery of said mining claim, or otherwise developing or improving the same, agreeably to the mining laws of the said Uintah district, or the laws of the United States, or otherwise.

They deny that from the date of said pretended location up to the

present, or for any time longer than days, the pretended locators, or their grantees, or vendees, or successors in interest, or plaintiffs, or any or either of them, have occupied said property, lode, or mining claim, working or developing or improving the same.

They deny that as to the discovery or location, or marking the boundaries on the ground, or possession, or doing the work annually required to be done thereon, said pretended locators or their grantees, or any or either of them, have fully, or at all, complied
8 with all, or any of the laws in such case made and provided, either of the United States, or of said district; or that they have occupied or worked the said pretended mining claim in accordance with the mining customs, rules, or regulations which have been or now are in force in said district, or have expended in such or any work on said pretended mining claim, for the improvement or development thereof, the sum of six thousand dollars, or more.

They deny that said plaintiffs, or any of them, are now in the actual possession of said pretended mining claim, or own the same, except as against the paramount title of the United States, the said James Harrington as a locator, or the other, or any of said plaintiffs by or through a regular chain of valid mesne conveyances, or otherwise.

And defendants further deny that a vein, ledge, or lode of ore, or rock in place, bearing silver, lead, or other valuable metals or any mineral ore whatsoever was at any time discovered at the alleged point of discovery, or within the limits of the said pretended Parley's Park lode or mining claim, by plaintiffs, or either of them, or any of their grantors.

And for further answer defendants allege, that on the 3d day of October, A. D. 1874, the premises hereinafter described as the Swisserland or Switzerland lode and mining claim, were entirely vacant and unoccupied mineral lands of the public domain, unclaimed and unoccupied, and subject to location as mining claims; that on said 3d day of October, and while the said premises hereinafter described, as aforesaid, were so vacant, unoccupied, subject to location as mining ground, and unclaimed as such, or otherwise, James Cain, Mike Heffern, and John Cammerman, each and all of them being citizens of the United States, entered upon and explored the same, and discovered and located said Switzerland lode of rock in place, bearing
9 silver, gold, and other metals. That immediately upon the said discovery, the said locators drove a stake on said lode at the discovery point, erected a monument of stone around said stake, and placed thereon a written notice of location, describing the claim so located and appropriated by reference to natural objects and permanent monuments as would identify the same, giving the names of the locators, and quantity taken by each. That they distinctly marked the boundaries of said claim upon its surface, so that the same could be readily traced upon the ground. That they performed all the labor and did all the acts required by the laws and regulations of said Uintah Mining District, Utah Territory, and the

United States, and thereafter caused said notice to be filed in the recorder's office and recorded in the proper books of record in said district, on the 5th day of October, A. D. 1874. That said locators remained continuously in possession of said located premises, working upon the same, and within three months from the date of said location, had done and performed in mining and developing the same more than sixty days' work, and had expended in money in said mining and developing more than five hundred dollars.

That by a series of mesne conveyances the defendants became and are the successors in interest of said locators.

That ever since said location the said locators and their grantees have remained continuously in possession of said premises, mining and developing the same, and before and since said location have complied with every custom, rule, regulation and requirement of the mining laws of said district of Utah Territory and of the United States. That these defendants thereby became and are the owner except as against the paramount title of the United States, and the rightful possessors of said mining claim and premises.

10 Defendants admit the description of the area in conflict between the alleged Parley's Park mining claim, and the Swisserland or Switzerland lode and claim, but allege the conflict area set forth in the complaint is part and parcel of said Switzerland or Swisserland lode, the property of these defendants. They allege that the claim of the plaintiffs to said conflict area is entirely unfounded, false, and fraudulent.

Defendants allege that said Switzerland lode through the ignorance or mistake of the locators aforesaid, was located and recorded under the name of Swisserland, instead of, as intended, Switzerland.

Said Switzerland lode consists of 1,500 linear feet along the vein, with a surface width of 200 feet, with all depths, widths, off shoots, spurs, angles, and variations, situate in Uintah Mining District, Summit county, Utah.

That the notice of location hereto attached, marked Exhibit "A," and made a part of this answer, is a true and correct copy of the notice of location of the Switzerland or Swissland lode, posted as aforesaid, and filed with the recorder of said district.

That said recorder in recording said notice committed errors and mistakes by means of which the true notice of location was made to read upon the district records as set forth in the notice hereto attached, marked Exhibit " B," and made a part of this answer. That subsequently said notice as shown in Exhibit " B," and as recorded through error and mistake, was by the recorder of said district, altered and corrected to conform with the notice filed with him for record as shown in Exhibit "A."

Wherefore defendants pray judgment that as against the plaintiffs they be decreed the owners, and entitled to the possession of the said Switzerland or Swisserland lode, including said conflict area set forth in the complaint herein and for the costs of this action.

HEMPSTEAD & GAMBLE, *Attorneys for Defendants.*

[Duly verified.]

[Exhibits "A" and "B," referred to in the foregoing answer, may be found in another part of the transcript.]

Report of Referee.

[Title of Court and Cause.]

This action having been referred to the undersigned as referee, by order bearing date the —— day of ———, the parties appeared before me on the 27th day of August, A. D. 1880, the said plaintiffs by Sutherland & McBride, their attorneys, and the defendants by Bennett & Harkness, their attorneys, and proceeded to trial, which progressed, with several adjournments, until the 7th day of October, A. D. 1880, when the cause was argued by a counsel for the respective parties and submitted for decision. Having duly considered the pleadings, the evidence, and the arguments of counsel, I find the following facts:

Findings of Facts.

1st. That the locators of the Parley's Park mining claim, mentioned in the complaint, at the time of the location of said claim, viz., on the 19th day of July, 1872, at the "discovery point" of said claim, discovered a mineral-bearing vein or lode, and the claim was duly recorded August 9th, 1872.

2d. That soon after said location, to wit, in the month of August, 1872, the locators of said Parley's Park mining claim marked on the ground the boundaries of said claim by setting stakes at the corners thereof.

12 3d. That prior to the 24th day of July, 1874, and within a year preceding that time, the owners of said claim performed labor and made improvements thereon of $100 in value.

4th. That each year thereafter, up to July 19th, 1878, work of the value of $100 was done on said claim by the owners thereof.

5th. That during the year beginning on the 19th of July, 1878, the owners of the Parley's Park claim were also the owners of two certain claims, called respectively the "Central" and "Lady of the Lake"—the Central adjoining the Parley's Park and Lady of the Lake adjoining the Central mining claim—and that, with a view to the future working and development of all three of said claims, the owners thereof located what is called the "Main Shaft" in the Lady of the Lake surface ground. That said shaft is in such proximity to said Parley's Park mining claim that work in it has a tendency to develop said claim, and said shaft was located and intended for the purpose of developing all of said claims.

I find that during said last-named year work was prosecuted in said shaft, and by improvements made thereat exceeding in value $300, and of not less than two thousand dollars in value. No work was done in said year after July 19th, 1878, and prior to the 15th day of September, 1879, in the Parley's Park surface ground, or

within its limits, by the owners thereof. I also find that the Lady of the Lake mining claim an application for patent was entered and paid for at the United States land office at Salt Lake City, Utah—no protest having been made prior to July, 1878—but not patent for said claim has yet been issued.

6th. That at the time this action was commenced the plaintiffs were in possession of said Parley's Park mining claim; that by the admission of the defendants on trial the plaintiffs, at the
13 commencement of this action, had the title to said mining claim by regular conveyances from the locators; that the Parley's Park Silver Mining Company was organized as a corporation on the 19th day of March, 1879, and on or about the first day of June, 1879, received a conveyance from said plaintiffs of said mining claim, and possession thereof; and this suit is prosecuted in the interest and for the benefit of said corporation.

7th. Before and at the commencement of this action the defendants claimed an interest in only a part of the premises embraced in said Parley's Park mining claim, and claimed said interest adverse to said plaintiffs; that said adverse claim consists of, and was based solely on, an alleged mineral location, made in October, 1874, called the Switzerland, which embraced a part of the said Parley's Park claim described in the complaint.

8th. On the third day of October, 1874, James Cain, Mike Heffron, and John Cammerman, entered upon the ground described in the pleadings as the Switzerland mining claim, and marked the boundaries as set forth in the answer and posted at the discovery point on a vein of mineral bearing rock in place, by them opened and discovered, a notice of said claim, which notice described the said claim set forth in the answer, and afterwards, on the fifty day of October, filed a copy of said notice as posted, for record, with the recorder of the district, which notice was recorded as follows:

Notice of Switzerland Lode.

We, the undersigned, claim fifteen hundred feet on this lead, lode, or ledge, or deposit of mineral bearing rock or metal therein.

We claim 140 feet northwesterly to the Ontairo line, and
14 we claim 1,360 feet southeasterly from this notice and monument, with 100 feet on each side of the vein for working purposes; we claim all the rights and privileges guaranteed to us by the mining laws of the United States and the local laws of this district. This location is situated 140 feet southwest of the southwest boundary line of the Ontario patent line stakes, in Uintah Mining District. Located October 3d, 1874.

JAMES CAIN,	300 feet.
MIKE HEFFRON,	500 feet.
JOHN CAMMERMAN,	200 feet.

That afterwards, and on or about the 15th of April, 1876, the attention of the persons who had recorded the notice was called to

the discrepancy between the record and the notice filed for record, said person having in the meantime ceased to be recorder of the district, and thereupon said person changed said record to correspond to the notice filed.

9th. That the locators of said Switzerland claim and their grantees claiming under said location have in each year since done work and made improvements thereon of the value of more than $100, and have been in the continuous possession of said improvements.

10th. That the defendants by conveyances from the locators and their immediate grantees, at the time of the commencement of this action, had acquired and still have the record title to said claim, and own all the title and interest therein which could be acquired from said locators and by subsequent compliance with mining laws and customs.

11th. The discovery point of the Switzerland claim, and the point where the location notice was posted, is within the bonds of the Parley's Park mining claim.

12th. That on the 13th day of September, 1879, Thomas
15 Cassidy, claiming the Parley's Park mining claim, was forfeited for want of work and improvements, located a mining claim called the "Accidental," embracing the premises in dispute in this action, and all that part of the Parley's Park mining claim lying easterly of the easterly end line of the Ontario mining claim.

13th. Said Cassidy, on said day, posted a written notice of location on a lode of rock, bearing silver, found within said claim, and at the discovery point. Said notice described the claim by reference to natural objects and permanent monuments, so it could be identified, and described it by metes and bounds, and also contained the name of the locator and date of location.

14th. Said Cassidy, on the 15th day of September, 1879, filed a copy of said notice of location in the office of the recorder of said Uintah Mining District, for record, where the same was duly recorded.

15th. Said Cassidy, and his grantee of said claim, have in each year since said location done work and made improvements thereon of the value of more than one hundred dollars.

16th. On the 19th day of September, 1879, the said Cassidy conveyed said Accidental claim to the defendant, Robert C. Chambers, who has ever since owned the same.

And the following are my

Conclusions of Law.

1st. That the plaintiffs at the commencement of this action were the owners and in possession of the mining claim called the Parley's Park, which was then, and still is, a valid mining claim embracing the premises described in the complaint, subject only to the paramount title of the United States; that the same is now
16 owned and held by the Parley's Park Silver Mining Com-

pany by like valid title, derived from the plaintiffs during the pendency of this action.

2d. That the defendants have no title or interest in said premises, and had none at the time this action was commenced.

3d. That said plaintiffs, or their grantees, are entitled to judgment or decree, declaring and confirming their title to said Parley's Park mining claim, and the premises embraced therein, and that the defendants have no right, title, or interest in said premises, or any part thereof, and also for costs of this suit.

P. L. WILLIAMS, *Referee.*

Dated Nov. 12th, 1880.

Supplemental Answer.

[Title of Court and Cause.]

The defendants, for a supplemental answer herein, allege and show to the court, on information and belief, that pending this action, and since the last term of this court, the alleged Parley Park mining claim has been wholly forfeited by the plaintiffs and claimants thereof, by reason of non-compliance with mining laws and customs in respect to said mining claim; that said mining claim was located July 19, 1872; that no work or labor was done, or improvements made thereon by the defendants, or any of them, or by any owner or claimant thereof, or by any person or party, since a time prior to the 19th day of July, 1878, to the 15th day of September, 1879, and that during all said time the Switzerland mining claim was held, worked, and improved in accordance with mining laws and customs. That on or about the 15th day of September,
17 1879, and after more than one year had elapsed since any work was done or improvements made on said Parley Park mining claim, and before the defendants, or any of them, or any locator, owner, claimant, or the heirs, assigns, or legal representatives of any owner, locator, or claimant had resumed work thereon, Thomas Cassady, a citizen of the United States, entered upon said Parley Park mining claim, and re-located a part thereof for a mining claim, and the part of the Parley Park mining claim so re-located includes all the area thereof in conflict with the Switzerland mining claim. That said locator posted a notice of said location on the ledge, giving the name of the locator, the date of the location, and a description of the claim located by reference to natural objects and permanent monuments, so the same could be thereby easily identified, and said notice also gave the name of said mining claim so located, to wit, the "Accidental Mine." That said locator remained in possession of said mining claim, marked the claim and its boundaries on the ground, so they could be readily traced and identified, and on the same day caused a copy of said notice to be recorded in the Uintah and Blue Ledge mining districts, in Summit and Wasatch counties, said mining claim lying in both said districts and counties.

The following is a description of said Accidental mine, as marked on the ground and described in the notice of location: Commencing at post No. 1 of the Parley Park mining claim, according to an official survey thereof heretofore made, and running thence south 25° 58′ west 200 feet to post No. 2 of said survey; thence north 74° 2′ west 588 feet to post No. 3 of said survey; thence north 11° east 200 feet, and thence south 74° 2′ east to the place of beginning, posts being set at each corner, and the initial point where the notice of location is posted is about 20 feet east of the discovery point of the Switzerland mining claim. And the defendants
18 allege that after said location, and on or about the 18th day of September, 1879, the said Thomas Cassady conveyed said Accidental mine to the defendant, Robert C. Chambers, by deed duly executed, acknowledged, and delivered, and the said Chambers thereupon took posession thereof. That said claim was located and recorded, and has ever since been held and worked in compliance with all mining laws and customs, and the defendant, Chambers, is now in possession thereof, working and improving the same.

Wherefore, these defeddants pray judgment as asked in their original answer.

TILFORD & HAGAN and
BENNETT & HARKNESS,
Defendants' Attorneys.

TERRITORY OF UTAH, } ss:
Salt Lake County, }

Robert C. Chambers being duly sworn, says, he is one of the defendants in this action; that the foregoing supplemental answer therein is true of his own knowledge, except as to matters stated on information and belief, and to those matters he believes it true.

Subscribed and sworn to before me September ——, 1879.

Judgment.

[Title of Court and Cause.]

This cause having been heretofore referred for trial upon
19 all the issues of law and fact therein to P. L. Williams, Esq., and his report of findings of fact and conclusions of law thereon having been filed, thereupon on motion of Sutherland & McBride, atttorneys for said plaintiffs, it is ordered, adjudged, and decreed in accordance with said findings and conclusions, that at the time of the commencement of this action the said plaintiffs were the owners, and that their grantee, the Parleys Park Silver Mining Company, is now the owner, subject only to the paramount title of the United States, and in the possession of that mining claim, situate in Uintah Mining District, Summit county, Utah Territory, called and recorded as the Parleys Park, mentioned in the complaint and therein described as follows, to wit: Beginning at the discovery

monument and shaft of said Parleys Park mining claim; thence along the centre line of said claim south 72° 2′ east seven hundred and fifty feet to a point in the centre of the eastern end line of said claim; thence north 25° 58′ east one hundred feet to post No. 1; thence south 25° 58′ west two hundred feet to post No. 2; thence north 74° 2′ west five hundred and eighty-eight feet to post No. 3; thence north 11° east one hundred and six feet to corner No. 4, from which witness post to said corner bears south 11° west five hundred and a half feet distant; and from said corner No. 4, the United States mineral monument No. 1 bears south 56° east one hundred and eighty feet distant; thence north 79° west seven hundred and thirty-two feet to post No. 5; thence north 64° west one hundred and sixty-three feet to corner No. 6, from which witness post to said corner bears north 25° 58′ east twenty-nine hundred feet distant; thence along the western end line of said Parleys Park mining claim north 25° 58′ east one hundred and twenty-nine feet to post No. 7; thence along the northern boundary of said claim south 74° 2′ east fifteen hundred feet to post No. 1;
20 containing five and $\frac{33}{100}$ acres superficial area. That the said mining claim was located on the 19th day of July, 1872, in accordance with the mining laws of Congress and the local rules and by-laws of said mining district, and has been held and worked in conformity with said laws and rules since the date of the location thereof.

And it is further ordered, adjudged, and decreed, that the said defendants, or any or either of them, have no right, title, or interest therein or thereto, or in or to any part thereof. That the Switzerland or Swisserland mining claim mentioned in the defendants' answer and therein described, conflicting with and overlapping the said Parleys Park mining claim, was not located in accordance with the said laws and rules, and so far as the same conflicts with and overlaps the said Parleys Park mining claim, as hereinbefore described, is wholly void.

And it is further ordered, adjudged, and decreed that the said plaintiffs recover of and from the said defendants their, the said plaintiffs', costs of this action, taxed at the sum of $1,175.96, and that the said plaintiffs have execution therefor.

JOHN A. HUNTER, *Judge.*

[Title of Court and Cause.]

Notice is given that the above-named defendants appeal to the supreme court of the Territory of Utah from the judgment herein in favor of the plaintiffs and against the defendants, rendered on the 22d day of November, 1880, for relief and costs, taxed at $1,175.90,
21 and from the whole of said judgment; also from the order of the court herein overruling defendants' motion for a new trial, the said order being made January 3d, 1881.

Dated Jan. 30, 1881.

BENNETT & HARKNESS, *Att'ys for Defendants.*

Undertaking on Appeal.

[Title of Court and Cause.]

Whereas the above-named defendants are about to appeal to the supreme court of the Territory of Utah, from the whole of the judgment entered herein on the 22d day of November, 1880, and also from the order overruling defendants' motion for a new trial made January 3d, 1881.

Now, therefore, we, Alvin F. Guiwits, of Salt Lake City, Utah, occupation, miner, and Adam S. Patterson, of the same place, attorney-at-law, do jointly and severally undertake and promise in the sum of two hundred dollars, that the appellants will pay all damages and costs which may be awarded against them, or either of them on the appeal, not exceeding the sum of two hundred dollars. And we do jointly and severally further undertake in the further sum of twenty-five hundred dollars, and acknowledge ourselves bound in said sum, that if the judgment or order appealed from or any part thereof be affirmed, the appellants shall pay the amount directed to be paid by the judgment and order, or so much thereof as to which the judgment or order shall be affirmed,
22 if affirmed only in part, and all costs and damages which shall be awarded against the appellants upon the appeal.

Witness our hands and seals the first day of February, A. D. 1881, in presence of—

A. F. GUIWITS. [SEAL.]
A. S. PATTERSON. [SEAL.]

ROBERT HARKNESS.

[Duly acknowledged.]

Title.

Now come the defendants and give notice of a motion for a new trial herein on the grounds—

1st. Insufficiency of the evidence to justify the findings and decision of the referee in the particulars mentioned in defendants' statement filed herewith.

2d. Errors in law occurring at the trial and excepted to by defendants, and more particularly set forth in defendants' statement filed herewith.

Dated Nov. 29, 1880.

BENNETT & HARKNESS,
Atty's for Defendants.

Statement.

Before P. L. Williams, Esq., referee; Sutherland & McBride, attorneys for plaintiffs; Judge Tilford and Bennett & Harkness, attorneys for defendants.

"It is stipulated by the counsel that the testimony taken
23 be considered as taken in all the cases; that will be so as to

all the testimony; that being taken in one case is to be used in all the others as far as applicable."

Besides the above-entitled case there were referred to the same referee a cross-suit between the same parties, involving the same questions and subject-matter, the parties therein being merely reversed; also an action by defendants against the plaintiffs, involving the same mining ground, the plaintiffs therein representing the Como Tunnel, and the defendants therein the Parley's Park mining claim; also an action by the defendants representing the Parley's Park claim against Harry Pickard *et al.*, applicants for and representing the Ontario No. 1 Extension East mining claim, which suit involved the right to the same mining ground in dispute in the principal case, and the foregoing stipulation refers to all of said actions, the attorneys of record being the same in all.

The following are the proceedings before the referee in the principal case first above entitled:

JAMES MOREY, sworn for plaintiff, says:

I am between 42 and 43 years old, and for 20 years my business has been mining and prospecting; and I have been in Utah since the 24th day of June, 1870, in American Fork, Cottonwood, Bingham, San Francisco, Parley's Park, Bluestone, and Tintic mining districts. I knew the Parley's Park claim in 1874. It lies on the survey side of Ontario hill, and some of the dump rolls into the old trail going up from the Ontario to the Lake House. The discovery shaft is northeast from the Ontario buildings, and about 1,200 feet from the Ontario discovery. I never measured it. Harrington hired me, and I commenced working on the Parley's Park discovery shaft between the 12th and 15th of July, 1874. Robert Griffin, Hank Langford, and Charley Cleaver worked with me. Harrington was foreman. Griffin and me worked two nights and a half
24 a piece, at four dollars a night—that was the wages those days. Langford and Cleaver worked five days before I went there, and they worked in all 7½ shifts. While I was there they worked on the other shift, and had worked five before. They worked the day shift. Harrington was taking out timbers. He was around there in the day time. There is always work for one man when there is two men working. We generally went to work at seven and quit at six. The wages was four dollars a shift, and ten hours is called a day's work for a miner. Harrington was taking out timbers and sharpening picks through the day. About four days before I went to work I was there and Langford and Cleaver were then at work. There was about ten inches of gouge in the shaft and ore and ledge matter all mixed. I guess it would assay three to seven dollars per ton—probably more, of silver. It ran right across the north side of the shaft, and was stronger in the east side of the shaft than it was in the west side. The streak went down from the surface, and when I quit the shaft was 28 or 30 feet—near 30 feet—

deep, and the streak went all the way down. There were six sets of timbers in it, and timbers are generally five feet apart, carry five feet lagging, and there was another set that Langford put a piece in. There were six sets, and over another set, probably six or seven feet besides. There was a few shifts done that Langford and Cleaver were not capable of putting timbers in.

There was work done there early tthe next spring. O'Donnell worked there, and I don't remember the other man—I could not say whether his name was Bevbridge—I guess they worked a good deal—pretty close up to July. I left in 1875 and went to Cottonwood. I think they worked three months or more, for they worked all the time I and three more were doing 50 feet of hard
25 ground, that we had $15 per foot for. When I worked there in 1874, I boarded at John Nelson's, at the Lake House. I think there was a man named Hanley, who worked with Harrington while I and Griffin worked there; but we worked nights, and I cannot tell how he worked. He must have worked as long as Langford and the other party worked in 1874.

Cross-examined:

We paid our own board, and got $4 per day. Harrington paid us in Nelson's house. I think he was not there at the time, but sent the money out to Langford. He went to town a day or two before we quit, and the letter came back with the money and orders to quit work. No; he stopped the work before he left, and the whole force had quit work before he came to the city. The shaft was 15 to 18 feet deep when we went to work. I am satisfied it was not deeper, because there were four sets of timbers, and takes four sets to make 15 feet. When we left it was over 30 feet. There were ten shifts worked after I went there, and the shaft sunk about 15 feet—it was very good rock to sink in. Langford and the other man had worked five days, and that would be ten shifts before I went there. I would call it soft ground, but some other people would call it very hard ground. It was necessary to blast sometimes. I didn't blow any of it—I ran on this gouge. Langford was not a good miner, neither was his partner—but my partner was. Langford and his partner sometimes had to blast. I and my partner used to put in a blast once in a while. I generally took out the ground by hammer and gad. I don't remember the day I went to work—it was the 12th or 13th of July—somewhere that way. The work was suspended just at the time when we quit, and that is all I know of work being done then. It was an open shaft with a windlass. The gouge was on the north side and the country rock quartzite.

26 Re-direct examination:

I saw Langford take the money that was sent out of the Wells-Fargo envelope on the counter. He paid me and my partner $10.50 cash. I think it worth $10 a foot to sink that shaft, or $15 to sink and timber it, as wages then were. If wages were $4 per day, I

would want to clear $5 and board on a contract—a man works pretty near as hard again on contract—I do, I know.

LEWIS REICH, sworn on behalf plaintiff:

Resides in Park city; have been familiar with mines in that vicinity since June, 1872; knows the Parley's Park claim; first knew it in July, 1872; was then in possession of Harrington; in August, that year, asked witness to help him stake the claim off, two others with them; they procured four posts; measured the windlass rope, it was 40 feet long; measured claim with that from the dump 750 feet along the center line N.W.; then measured 100 feet from center line, and put first post at N.W. corner from center line; then measured 100 feet to S.W. corner and put post there; then from the discovery shaft measured 750 feet S. E.; then 100 feet from center line, put post at S. E. corner; 100 feet from center line north put post at N. E. corner, along side of a large stump; set posts at the four corners; claim ran N.W. and S. E.; length 1,500, width 200 feet; at discovery at that time a little monument of rock not quite two feet, stake in it with notice on board; stakes at corners, four inches square, three feet high, were marked with lead pencil designating the stake.

At that time discovery shaft, all of fifteen feet deep, four and a half to five feet square in clear; this shaft is to the left of trail from Ontario, going up the hill; work has been done since; never saw any notice, only this board; think it was written on the board claiming 750 N.W. and 750 S. E.; in '76 helped Gorlinski make
27 survey of claim; at that time found no stakes at all; snow on the ground at that time; survey lines were very near same as original measuring; was not fifteen feet variation at both ends; he pointed out ground to surveyor; had no interest; work done in July and August; Harrington and two other men there; work was done after stakes set up in '72; a few days' work; would cost, including timbering, about $15 per foot; some work done in 1873; discovery of Parley's Park 700 to 800 feet from Ontario discovery—a little S. E. of it; knew no locator but Harrington; his name was on the board; recollects no others.

In 1873 shaft was sunk some deeper; don't know who did it; in 1874 shaft was sunk 15 feet deeper; it was prior to September, '74—worth about $15 per foot; it is hard rock; noticed the vein at discovery shaft; saw rock on dump which he would call ore; vein softer than surrounding rock; was colored after 1874; a large incline shaft has been sunk; it has been there since 1874—call it Whim shaft; went down it once when they said it was two hundred feet deep—this was in 1875; Harrington sunk it; Frank Riley and Clancy were there and worked for or with Harrington.

Saw two east stakes afterwards; in 1876 sometime, maybe '75; would not say the same stake; it was in the same place; N. E. corner stake was in the stump; saw it in 1874.

Cross-examination by BENNETT:

S. W. corner stake not over 100 feet from Ontario discovery; Ontario was 200 feet wide between discoveries of two claims, seven and eight hundred feet.

S. W. corner stake up the hill from discovery of Ontario; could see Ontario from stake; an open cut was near this corner stake, not more than fifty feet away; there were large trees; a tree was near N. W. corner stake; no workings near there.

28 During the fall of '73 boarding house of Ontario was built near N. W. stake; it was 500 or 600 feet away.

Set these stakes between 10th and 20th of August, '72; didn't know where the corners of Ontario were at that time.

Was a large pine tree near S. E. corner stake about 200 feet distant; this stake was driven into the ground; Lake House is near that spot now, 300 to 400 feet distant; James Kane's cabin is about 150 feet distant; was put there in 1874; N. E. corner post was set about 200 feet, a little S. of W. from Lake House.

Re-direct by MCBRIDE:

Parley's Park a little south of east of the Ontario discovery.

ROBERT CAMPBELL, sworn for plaintiffs, testified:

I have lately been living at Stockton. I am a miner, and have been for over 30 years—about 32 years, and have given attention to that business in this Territory since 1873—seven years—in Parley's Park, Alta, Bingham, Dry Canyon, and Stockton. I left Bingham in July, 1874, and went to Parley's Park and remained there 18 months. I did not work for wages at Parley's Park. I had a lease of the Woodside, and I knew a claim called the Parley's Park at that time. Jim Harrington was working it when I went there. I know where the Ontario is. The Parley's Park is up on the hill from the Ontario toward the Lake House, where the Lake House used to stand at that time, upon the ridge before you went over to the Lake from the Ontario mine. Harrington had just quit work about that time and was coming down that day to see whether he would carry on work or not. Jim Morey, Griffin, Hank Langford, and another young chap, I forgot his name, stopped at Nelson's, who was keeping the Lake House. There was considerable work done on the Parleys Park after I arrived there; there was a

29 whim put up when I left. There was not any work done after I left in the same place. I used to go around there two or three times a day, kind of hunting for a lead close by there myself, and saw on the dump fresh rock just come out. I saw that the work had been newly done. There was a shaft there 25 or 30 feet deep, I should judge. I looked down the shaft and thought it was all new work, and it looked like they had just quit work on it. I could not tell whether they had sunk the entire shaft in 1874. There was timber in it, and the timber looked all alike. When I

arrived they were not at work, but were waiting for Jim Harrington to come out from town. Jim sent the money out to Hank Langford and the men were paid off while I was there. I don't know how much money was paid. I arrived there the 24th of July. The boys that were waiting there did not do any more work. I believe they started to work there again that fall. I could not tell exactly now. I know that Jim Harrington worked there afterward sinking an incline. I forget whether it was that fall or the next spring. I I know there was a good deal of work done there either that winter or the next spring. Harrington worked there some time, must have been two or three months—two months anyhow—either that fall or the next spring, in sinking a new shaft. I know where the discovery shaft is, and that is the shaft I refer to as down between 25 and 30 feet. The work I speak of his doing afterward was on a new shaft up the canyon more and still further along the ridge beyond the Ontario. I was up there again last fall a little while. The shaft Harrington worked on two months or more after I went there, is the one where the whim is and under the building. He had two men that I know of working with him at the time I say he worked two or three months on the shaft. Harrington was around there seeing the work was done, he had charge of it. Clancy was one of the two men—I think his name is William —but I don't know the name of the other. I was there in the spring of 1876, and there was no work doing then that I know of. I left in March, 1876, and have not been back until last fall.

Cross-examined:

I went to Park City for the first time July 24th, 1874, and the same day went out and saw the Parleys Park mine. I went over to prospect. Griffin and Morey showed me where the claim was and the hole they were working in. There was a little lead there; in the shaft there was ledge matter; it appeared in the ends of the shaft, and I think it dipped a little straighter than the shaft was going. It looked from the surface as if the vein underlaid the shaft. I looked down the shaft on the 24th of July. I could not see the vein at the bottom; it was at the surface where I saw it. I could not tell exactly which way the vein was running; it appeared to be running from the Ontario and to it, the same course like. From the dip I observed I should think the vein would run out of the shaft at the bottom. Griffin, Morey, and Langford were not at work went I went there. They had just quit and were waiting for their money. I cannot remember whether it was that fall or the next spring that Harrington resumed work. There had been fresh work done on the shaft when I first went there, but the amount of it I don't know. When work was started again it was 150 or 200 feet from where the first hole was, further from the Ontario where they were sinking a shaft, and they put up a whim there shortly after they started work. This was an incline shaft and the whim was over it. There was no house there then. The whim house

was getting built, but was not completed the last time I was on the hill. I was up there a portion of the time in 1876, and left,
31 I think, in March, 1876. I could not tell whether it was put up in 1874, 1875, or 1876. I remember simply the circumstance of its being put up.

It was here stipulated by counsel that the deraignment of title on both sides is admitted; that the plaintiffs were the owners of the several claims at the commencement of the suit, and that the title is now in the Parleys Park Mining Company, derived from Harrington and others, who are plaintiffs in one suit and defendants in the other, by conveyances since the commencement of the suits. Either party may introduce the deeds in the course of the trial if it becomes necessary to any other question. It is stipulated that whatever title was acquired under the locations has come to the parties by regular conveyances. It is also conceded that the Parleys Park Mining Company are in possession and claiming to own the adjoining claims, called the Central and the Lady of the Lake, and have been since the summer of 1878.

[Plaintiffs here put in evidence the notice of location of the Parleys Park mining claim, and also the notice of location of the Ontario, annexed, marked Exhibit "A."]

ROBERT A. WADDELL, a witness for plaintiffs, testified:

I reside at Park City, Summit county, and I first became acquainted with that section of the country in the early part of July, 1872. I was then prospecting for mines, and Johnny Bechtel was with me. I know the parties to this suit. I first became acquainted with Harrington about the middle of July, 1872, when he was sinking the discovery shaft of the Parleys Park mining claim. I know the ground in dispute in this case, and was first on it in July, 1872. I was passing over the ridge and down the hill about the middle of July, 1872, and found Mr. Harrington at work in what is known as the Parleys Park discovery shaft. The shaft was then, I think,
32 from eight to ten feet deep. It was deeper than his head when he stood erect. That was my first acquaintance with him and the claim there. He was by himself; Mr. Bechtol was with me; he was sinking a shaft. There was a notice standing about four or six feet from the northeast corner of the shaft, a location notice, on a post about three feet hige. On the post there was a part of a box and the notice was on that. It was a written notice. I don't know what was on the notice except that it was a notice of that claim. I recollect the name of the claim was the Parleys Park. I do not recollect the names of the claimants. Mr. Harrington was working there, and said it was his mine. I recollect there were names on it. I think this was not later than the 20th nor earlier than the 10th of July, 1872. A few days after, not that day, I saw a stake standing about 200 feet, as near as I can judge, from the northeast corner. There was a stake standing about eighteen

inches or two feet high marked Parleys Park, and something else, but what I don't recollect, twenty feet from the patent stake at present—I mean as near as I can place it. It was a round quaking-asp stake marked with a pencil. That was within two or three days. Then I was passing over the trail near where the wood road now is, going around to the Red White and Blue mine with Sam Teneyck. I took dinner that day with Mr. Shin, I believe, and there was a stake standing very near the path on the right hand side going up to the Red White and Blue, and near where the patent stake now stands, nearer than the other. That would be the southeast corner. The westerly end stakes I never saw. These stakes were both marked Parleys Park. Teneyck caused me particularly to look by asking what it was. He was on horseback and I on foot. I don't know that I ever saw them afterwards, except the northeast stake, which I saw afterwards on several occasions within a few
33 weeks. I know where the Parleys Park boarding house or cabin now stands; it is on the ground, and stands, I suppose, about 500 feet westerly of those stakes, nearly due west of the northeast corner stake. The discovery shaft is almost on a line between the cabin and the Ontario hoisting works. It would be very little north—if anything—of west, nearly due west, possibly a few feet north of west. The discovery shaft is nearly west of the Ontario discovery. I guess that map is probably correct. The discovery shaft is near the top of the hill up a gradually sloping hillside, and just to the left of the trail that runs from the Ontario boarding house to the lake. It is just to the north side of the trail and but a few feet distant. The trail that runs from the north end of the Ontario boarding house to the lake passed within a few feet of the Parleys Park cabin. This lake, with reference to the Parleys Park cabin, is some east, some northeast, and some north. The lake is just over the divide. Pass up the hill from the Ontario past the discovery shaft and over a few feet in elevation, probably fifty yards, you reach the summit; then a very slight decline into this little flat where the lake is. These stakes were both on the south side of the lake. The northeast corner was about 100 feet from the lake as it then was, and the other one south of that. They were on the same slope with the lake east of the discovery. I was prospecting on the westerly end of this claim a day or two before I saw Harrington, and I asked Harrington the course of his location for the reason that I had discovered some very good looking rock within a very few feet of where the Switzerland now is, and a little northeast from it I discovered fine looking vein rock. It was about six feet north of the Switzerland shaft—diagonally between the shaft and
34 Parleys Park cabin and a few feet from the shaft—probably eighty feet from where the cabin now stands. There is in the Parleys Park discovery shaft a vein as deep as you can stand on the surface of the ground and look down into the shaft. It is there to-day for anybody to see, and it was then. It was then as deep as

the shaft was; I don't think the vein exceeds a foot in width anywhere, from four to twelve inches in thickness, vein matter all the way down between quartzite walls. It comes all the way to the surface—that is, to the rock. It does not come to the grass roots. I call it a well defined vein; at the same time the walls are somewhat decomposed, still it is perfectly defined, with walls on either side. The mineral discovered near the Switzerland shaft was more of an ore—that is, it looked more favorably as a pay ore. It was a yellow quartz, intermixed slightly with black stains, and the quartz showed it was from a mineral bearing vein. I think the vein in the discovery shaft is in course nearly due east and west. The shaft goes down perpendicular, and the vein gradually breaks to the north. At present the timbers have fallen in so you cannot see down the shaft exceeding twenty feet, but the vein is still in the shaft as far down as these timbers will permit you to see. The vein dips slightly to the north. I don't think I ever saw Mr. Harrington but that once on the ground. I left the park about the middle of August, 1872, and did not return until 1876. I then found the shaft on this claim deeper and timbered up and looking well, and the lagging where the vein shows was pulled out so that the vein between the first and second sets of timbers was plainly exposed; anybody could see it. I should judge from looking at it the shaft was thirty or forty feet deep. There was a whim house on the claim. This little house was built, I suppose, about 100 feet from the discovery shaft, nearly due east, right on the course of the ridge. It is now blown down. There had been work down there; there was a whim house with a whim in it; on the south end of the whim was a blacksmith shop, and a shaft down to a considerable depth. I could not see down it; it was covered at that time. There was no one there at work, and no work has since been done at that point. I have seen this shaft frequently, but have never been in it, but judging from the timbers and appearance of the incline, it is probably over 100 feet deep. This is from sixty to eighty, possibly 100 feet from the Switzerland shaft, and little north of west from it. I noticed a hole where the northeast corner of the Ontario patent ground now stands; I think the stake is on the dump. The hole is probably four feet deep, has been deeper, but has caved. A cut which I and Bechtol had worked in a few minutes, in 1872, on the north of the trail, has been enlarged, but still is only about two feet deep. There was another cut about ten feet westerly of the other that was dug between 1872 and when I came back in 1876. There is mineral in all three of those holes, that is, any prospector would locate them as mines. I think it was the 7th day of July, 1876, that I came back, and I have been familiar with that ground since then, and have lived part of the time at Park City, and part of the time in a house at the lake, northeast of the Ontario, very near the ground. I know of no work in 1876. In 1877 Wm. Coullard ran a long cut about eighty feet east of the boarding house, on the top

of the ridge. The cut is about forty feet long, and will average probably five feet wide, and in the face of the cut there is a shaft that is about twelve to fourteen feet deep from the surface and from six to eight feet deep from the surface of the cut. The cut at the face is probably eight feet deep, that is the southern end of it. It runs on a level from where it commences at the surface, and of course catches the rise of the hill. Part of the cut appears to be in solid rock, but it may be only a boulder
36 that is right in the mouth of the cut, and from there to the face it is rock and earth intermixed throughout. It is good picking ground, not soil, but rock and earth and vein matter intermixed. The vein matter appears nearly all the way in, but from the face to where the shaft is it is well defined, and several feet in thickness and dips to the north. I saw the parties at work, but do not recollect who, besides Mr. Coullard, they were. They were working there on several occasions when I went up, but I don't know how long they worked. Since 1868 I have been accustomed to mining business and work, and am acquainted with the value of work done in that district at that time, and I should say the work done in that cut and shaft was worth $125 or $130. I do not know of any other work on that claim in 1877. In 1878 I was living at the lake, and there was a shaft sunk from eighty to 100 feet, a little west and north of Jim Caine's cabin, nearly in front of his door. This is nearly due east, and about 200 feet distant from Parley's Park cabin. I do not know who did this work. Joseph A. Coullard was in charge of the men. I do not know of any other work in 1878. The depth of the shaft was about thirty feet—from twenty-five feet to forty feet. It was sunk through earthy matter—there was very little dirt there—and the dirt taken out by windlass. I saw two men at work in the shaft at one time. I don't think that shaft was worth over four dollars a foot; it could probably be contracted for about that. The value of putting it down would be from $100 to $125—might be a little less than $100 and might be considerably over. I think it could be done for about four dollars per foot. The shaft remains there open, but the timbers are caved. I do not know of any other work. This work was done, I should think, part in September, and part in August. They commenced in the latter part of July, if my memory serves me right, and I think they finished in September.
37 There has been no work done on that ground since, to my knowledge. Yes, there was a shaft sunk by Tom Cassady, and I think Tom Jordan and some other men since then. There is another shaft, but I don't know who sunk it; it lies east of the shaft Coullard sunk. There were three shafts there; Coullard put the first one down, the other was sunk by Cassady, and the other I don't know who sunk it nor when, but it was after 1872; it may have been sunk in 1879. The east shaft of these three is about forty feet deep in earthy matter. The middle one about thirty feet in depth, and the other I never saw the bottom of. The

first time I saw it was in 1879, it had caved in; this is the one Cassady sunk. The dump is not as large as the others, probably it is twenty to thirty feet deep. The whim house was built of boards and the whim stood in the middle of it, and it was about 24x30 feet, and between the shaft and the west wall of the house there was a blacksmith forge where they did their sharpening, and that addition, I think, was eighteen to twenty feet wide and not more than fifteen feet in length. It was built of lumber, roofing and all. I first saw the Parley's Park cabin in 1876; it was occupied in the fall of 1876, I think, by Mr. McFadden—I am not certain of that. It was occupied after that, and I think is now occupied by a family and I don't know it has ever been unoccupied. It may have been unoccupied, but for a short time if at all. I think the name of the man I knew, and who worked for Coullard in 1878 on the shaft, is Pete Conover.

Cross-examined:

I was first employed in this case some weeks ago; think it was within two months. I am counsel in this case as well as witness, and I am to receive payment as counsel. It was not stipulated when I was employed that I should be a witness. I am not
38 aware it was understood I should be a witness; I expected to be a witness in the case and I don't know, but presume they expected me to be. I made an affidavit as far back as application for patent. I told Judge McBride it was a matter of courtesy on his part that I should be employed; that I was interested in the case and was a member of the bar, and I thought it a matter of courtesy—of favor—that it would look better, as I would probably be an important witness in the matter. I thought it to my advantage to be employed in the case. It was pecuniarily so and I thought it to my advantage to be employed in a case of this importance. I did not offer any inducement. Charles Jones had spoken to me before I spoke to Judge McBride. I believe he is not connected with the plaintiffs in any way. He is employed by the Parley's Park Company; he thought they would employ me as attorney in the case. I told Judge McBride I thought it would look better, being a member of the profession, not to come as a common witness.

I think I went to Parley's Park the 5th of July, 1872. A week or ten days after I got there I commenced building a cabin near the lake. John Marley and three young men named Nye assisted me. It was in July that I first saw Harrington, and within a day or two afterwards I saw the stakes. The shaft Coullard sunk in 1878 was begun, I think, the latter part of July. I do not know it was done before the 19th of July, 1878.

JOHN SHELTON, sworn for plaintiffs, testified:

I reside at Miday—keep my family there—but I have been in the Park though for the last five or six years, hauling wood, timbers, lag-

ging, charcoal, &c.; I know where several holes have been dug on the Parley's Park mining claim, but as for the stakes and boundaries I don't know; I know where what is called the Parley's
39 Park cabin is, and where the lake used to be, and am familiar with the country, and have been since 1875; I know of Harrington doing work at the whim house; he was foreman; I let him have some charcoal when he was doing work there in 1876 on the whim shaft; I saw him about there several times after that; he came up in 1878 and was foreman awhile, sinking a shaft right in front of Jim Caine's cabin on the lake flat; I had a cabin close by; Fitzgerald, Jim Caine, Peter Conover, Frank Custer, and George Duke worked there then on the shaft; I was on the Barrio's ground, and about 100 feet from my cabin; part of the boys boarded with me; I cannot state when the work was done, but somewhere the last of July or first of August; it was done after the 24th of July; Coullard was boss of the men when Harrington was in Salt Lake and not there; it was Jo Coullard who directed the work, and he boarded at the Parleys Park house; as near as I could tell they quit work about the last of July or first August; I could not say, for I never kept any dates; as near as I can tell it was after the 24th of July; it was sometime along the latter part or fore part, and I am not positive for I don't know; I could not tell any wheres near to ten days, I don't suppose, because I kept no days nor dates.

PATRICK FEENEY, sworn for plaintiffs, testified:

I am a miner and live in Park City, near the Ontario; have lived there five years; I am now mining in the Hawkeye shaft; I know of such a claim as the Parleys Park, and know Mr. Harrington going on six years; first knew about this ground in 1878; I know where the whim shaft is, above the Ontario; I never saw Harrington at work there; I should guess it was in 1875 that I first saw the whim house, and it was up when I first saw it; I was not up there until 1878; I know where the Parleys Park cabin is; first saw it
40 in 1878; the first of June I started up there to work, and it was then occupied by Jo Coullard. In 1878 I worked for Chambers and drove a cross cut, tapping the Parleys Park discovery shaft, and then I was sent out of there; I worked, running a tunnel northeast, a distance of 75 or 80 feet; the shaft was timbered up and looked pretty good for a prospect shaft; I tapped it about four feet under and broke into the bottom of the south side and made an opening enough for a man to pass up and down; the tunnel run through what I call green granite; I run this tunnel 35 or 40 feet below the surface.

JAMES M. KENNELLY, sworn for plaintiffs testified:

I am a miner, and live in Park City; I went there first ten years ago, and my business there was prospecting; I first knew Mr. Harrington in 1872, and I know where the Parleys Park mining claim is, and what they call the discovery shaft; I first saw the shaft in

July, 1872; it was then a hole five or six feet deep, and there was a man in it; I think it was Harrington; this was along about the 20th or last of August; I don't remember exactly; Harrington was working in it; there was a board there with the name of the claim on it, at the southeast end of the shaft, like three or four feet from it; I did not see the shaft again until 1874, and then it was, I think, 30 or 40 feet deep, more or less; it looked to me like old work and the shaft was timbered; I afterward saw Harrington working what they called the Parleys Park incline shaft, east of the discovery shaft, working a whim there, sinking a shaft; it is right on top of the hill going eastward; I think it was in 1875, either the fall of 1874 or 1875, and I don't remember which; when I first saw it I should judge it was 80 or 90 feet deep and a well timbered shaft; I think it was in the fall of 1874, and I might
41 have seen it early in the spring of 1875; I think there was with Harrington a man named Riley, John Halpin, and a young man named Wm. Whiteman; I never measured the shaft, but I have an idea it is about 220 to 250 feet deep; I worked down there for Harrington in 1876; I helped run a cross-cut in there, and drove on the lead, I think, 18 feet westerly and 14 feet easterly; these levels were run at a depth of 240 or 250 feet, I should judge; the shaft was timbered in good shape; I should judge a man could sink and timber that shaft for $12 per foot; the shaft house was built there; I should judge the building could be put up for $600 or $700; it is expensive to haul timber up there; I think I first saw the Parleys Park cabin in 1875, and Harrington occupied it then; Clancey occupied it, and this man Coullard has been staying in there; when I was there the parties working the Parleys Park mine occupied it; I worked there three or four weeks in the spring of 1876; I think I was paid three dollars per day and board; I knew where the lines of the claim were when I worked there; I did not know them previous to the survey; I know where it was surveyed; the N. E. corner is about 30 or 40 feet from the old Reich house; then it runs 200 feet southerly from that, then westerly down towards the Ontario, past the hoisting works, then northerly 200 feet to another post we put up there; I helped to plant the stakes myself; I think the survey was made in 1876; I think Mr. Clancey helped, but I don't remember the others; I think the discovery and whim shafts were embraced in the survey; Coullard and one or two men with him worked there in 1877, and run in a cut east of this whim shaft and south of the cabin, and I should judge north of Caine's cabin; I am not acquainted with the points of the compass; the cut, I should judge, was between the Ontario and Caine's cabin, and east of the Switzerland shaft about 40 feet, and on the incline toward
42 the lake; I should judge the cut was run nearly north and south, and a portion of it 10 or 12 feet deep and between 5 and 6 feet wide, might be 7 feet in places—average 5 feet wide or a little less; it was run in tough clay stuff—ledge matter; it would

cost $120 or $150, or such a matter, and might cost more; I think it was done in July or August, 1877; in 1877 Harrington took me to the southeast corner and dug down and uncovered a stake wrapped in a gunny-bag, which he said was the old stake; another stake stood near, but this one was not visible until he uncovered it; he pointed out another, but I did not get out of the buggy to look at it; I know where the initial point of the Switzerland is, or where the notice was; it lays about southeast from the whim shaft of the Parleys Park and about northeast from the Ontario No. 1 east mining claim, supposed to be on the same ground; the Switzerland was first claimed in 1874, I think; I don't know whether work was done on the Parleys Park in 1874 or not; that year Dutch John and Caine were working at the Switzerland discovery, 80 or 100 feet southeast of the Parleys Park discovery, and very close to where the shaft is put down; there was very little work done when I first saw it—might have been $25 worth, more or less; the claimants were then at work; I was at work on the Ontario Extension No. 1 east for Harry Rickard; this claim covered nearly the same ground as the Switzerland, and the north line of it was north of and included the Switzerland discovery point, and I had a conversation with Caine and others working on the Switzerland in regard to these two claims.

Q. What did they say about the conflict between the ground you were on and their ground?

Objected to by defendants' counsel, as incompetent and immaterial to show what was claimed between the Rickard ground (the Ontario No. 1) and the Switzerland. Objection overruled. Defendants except.

43 A. The owners of the Switzerland stated the title of the Ontario No. 1 east was the best title of the two—that the title of the Switzerland was no good; Jim Caine said so; he located both claims, as I understood. [Witness continued.] When I was working on the Ontario No. 1, they were working on the Parleys Park shaft; I think it was in the Spring of 1875 that I worked for Rickard, and I don't think it was more than a year after the location of the Switzerland; after that I worked at the Parleys Park whim shaft and in the cut; there is work done between the cut that was run in 1877 and the lake; there is a ditch running there, a hole sunk, and cuts; I think this Frenchman, Coullard, was working there in 1878, and I think Clancey was working there, but am not sure, and I think a man was working with him.

Cross-examination:

I think the conversation with Caine in regard to the Ontario No. 1 east, being the better title, I think was in 1875; he said Rickard had owed him for work on the Ontario No. 1, and he went and made the Switzerland location, but Rickard had paid him, and he be damned if he wouldn't go back on the location; that his partner

never sold out of the claim, and he was entitled to the Switzerland ground through the Ontario No. 1, east location.

WILLIAM A. STANTON, sworn for plaintiffs, testified:

I know of Parleys Park mining district; I first went there in 1873; remained there a short time and returned to Salt Lake City; I returned to Park City and resided there about three years up to April, 1876; I have not resided there since; I have been residing in North Carolina two years, and came here two weeks ago last Thursday; my business is mining, and was mining and prospecting when I lived in Park City; I worked at the McHenry, Flagstaff, and Ontario; I know the Parleys Park claim; I first read
44 the notice on a tree, I think, in 1874; it was east of the Ontario; I know where the discovery shaft is; I think the notice was about ten feet from the shaft, and I think I read it; I remember the names of Harrington, Perkins, and Paxton; I do not remember the date of location; I saw the shaft in the early part of April, 1874; I think somewhere along there; it might have been 15 feet deep, but some work was done after in the same year; I passed by the ground often; the latter part of 1874 I was employed by the McHenry, and saw the Parleys Park claim every time I went down to Park City; I have seen Harrington there; the first time I saw him there was in 1874; I went with him to the mine; the shaft may have been six by ten—somewhere about there—and some timbers around the top of it; a lot of stuff had caved in around the top of it; it was a perpendicular shaft—quartzite walls, and a sort of streak of something; it was not very wide, and did not look as if there was any mineral in it; there was a streak of stuff there that looked to me like it might be a vein; it had walls on both sides; I think there was some work done there in July afterwards—it may have been in June—then after they quit other parties worked there; I think Morey and Langford worked there, and Bill Wallace and Mike O'Donnell done a few days' work, I think, the same year; I should judge there was between 20 to 30 feet sunk that year; after all the improvements that year, I think the depth of the shaft might reach 30 feet—25 or 30 feet; I should judge it worth $12 per foot to sink it.

(It was here stipulated by defendants' counsel that no question was made about the sufficiency of work on the Parleys Park claim in 1875.)

The vein in the shaft seemed nearly east and west, and continued all the way down the shaft, so far as I could see.

Cross-examined:

I left the park in April, 1876.

45 ANDREW LINDSEY, sworn for plaintiffs, testified:

I went to the Parleys Park Mining District in July, 1872, and

have been acquainted with it since; I first knew of the Parleys Park mining claim in July or August, 1872; I did not see any one on the claim; there was a hole about nine or ten feet in 1872; the work looked fresh; I have resided in that district most of the time since 1872, and have been familiar with that ground; James Morey and Langford done some work there in the Whim shaft in 1874; I saw them at work there, and think it was at the incline; it was in the month of July; I have been part way down the incline shaft; I have seen some stakes; there was one stake pretty near due west from the discovery shaft, and one on the southeast side of the Lake flat, pretty close to what is called the Lake House, a little southeast of the Lake House, close to the road; it was in sight of the road and marked; it stood between four and five feet high; a quaking asp stick four inches square; I first saw it in 1874, and it looked weather beaten and not very new; the one west was down toward the Ontario discovery from the Parleys Park discovery, a little north of it; it was straight down toward the Ontario gulch from the discovery shaft west; I saw this one in 1874; I don't know that it had any mark only U. S. on it; I could see that on it; that was cut on; it was on the hill side, pretty well down, just northeast of the Ontario discovery; I saw it in passing up and down the trail over the hill; it was square, three or four feet high; I should judge the Parleys Park discovery shaft in the summer of 1874 was 15 or 20 feet deep; I am a miner; I should judge it would be worth about $15 per foot to sink and timber it; Joseph Coullard did some work there in 1877; there was some one with him, but I don't know who it was; I saw them at work; I understood Coullard had charge of the work; it was an open cut about 100 or 120 feet
46 south of the whim house; it was about 30 or 35 feet long, and about four feet wide; it was running with the pitch of the hill and gained depth as it went in; it was level and I should judge 12 or 14 feet deep at the back end; there was a shaft at the end of the cut, 15 or 16 feet below the level of the cut, I should judge; some of that ground was hard and some soft; a good part of it was picking ground and some of it was blasting ground; they had to blast in the bottom of it, I understood; it would be worth four to four and a half dollars per foot to run the cut; I would not be sure but I think Joseph Coullard cleared out the incline shaft that year; he lived in the Parleys Park cabin that summer; I know of work done in 1878; it was in a shaft in front of what is known as Jim Caine's cabin; George Duke, Frank Carter, Peter Conover, and Jim Caine worked there, and I think Fitzgerald; I think it was along in July, and they finished up in August; there were two shifts; I should think the work worth about nine dollars per foot; the ground was a kind of porphyry, mostly picking; I am not positive whether Harrington or Jo Coullard directed the work, though I think it was Coullard; I think the shaft was sunk between 30 and 40 feet, and it was timbered; there was some work done on that ground by Tom Cassady in 1879, and I think there was three

who worked with him; I know the three shafts close together; I don't know who put down the third, but it was done in 1879; Harrington had charge of the whim shaft the first time I saw work going on there; I think when I saw Morey and Langford at work in 1874 it must have been in the discovery shaft, but I don't know.

Cross-examined:

I think the work done in 1878 on the shaft near Caine's cabin was done in July and part in August; I was then living
47 down the McHenry gulch about 300 yards from the Lady of the Lake hoisting works; the men that worked there commenced the shaft new; I passed there twice a day; they worked there about two weeks I think.

JOSEPH A. COULLARD, sworn for plaintiffs, testified:

I went to Park City November 22d, 1876, and have resided there since; I know the Parleys Park claim; have lived in the cabin, and at different times have been in the employment of the owners of the claim; I done some work for them in 1877; I ran a cut about 120 to 140 feet from the whim-house; the cut just lies to the east or southeast; it is run from the north to the southwest, and is between 50 and 60 feet long, about four feet wide, and perhaps eight or nine feet deep at the southerly end of the cut; they sunk at the same time a little shaft three or four feet deep at the end of the cut, and with the cut it may have been about ten feet deep; it cost between $120 and $130; I had charge of the work as foreman; I believe it was in the latter part of July or beginning of June, 1877, it was made; there was some work done in the whim shaft in January or February, 1878; no work but the cut was done in 1877; there was a shaft, I should judge, 50 to 75 feet below that cut, that was sunk; Mr. Harrington was in charge of that work; I was not engaged in it; I think Griffin, Lew Reich, and Clancy worked under Harrington; they sunk, I think, 23 feet, and run a little drift each way—one north and one south; I believe they worked about a month, but am not positive; I think Mr. Morgan paid them $150; it was probably worth $115 or $120—maybe a little more; I believe there was some work done in the latter part of July or fore part of August, 1878; it was the same shaft; the shaft caved; this drift I am speaking of caved the shaft; they
48 sunk there again through the caving of the shaft; I worked on that; I believe Mr. Fitzgerald was with me a day or two, and, I believe, Mr. Caine a few days; I worked myself only three or four days, but there were others working when I quit; I still continued in the cabin; I understood a hundred dollars' worth of work was done at that time; I believe it was worth $100; the shaft is, I should judge, probably 70 feet northwesterly from Jim Caine's cabin; George Duke was working there at that time, also Frank Carter and Peter Conover, and Caine, I believe; I worked myself, and I don't know about Fitzgerald; I done some work the same

year, in the beginning of October, cleaning the cut; I wanted to timber it; I worked five or seven days—eight or nine days, probably; I would rate my services at that time $35 or $40; there was a little more work done in November on the house, and I myself covered the house anew; I had a man there named Shelton; I paid him $18, I think; I also paid Mr. Clancy for work about $20 or $25; I don't know what work he did; I hired him and told him to stay there until I came back, and do whatever he could; I employed him to occupy the cabin and do whatever he could during my absence.

Cross-examined:

I think the cut run in 1877 went 50 or 60 feet; I never measured it, but guessed at it; I don't remember the names of the men who worked there, but think there were three; it was run the latter part of June or beginning of July; in January following Mr. Harrington did some more work; Reich and Griffin worked with him; that was, beginning a shaft; I had nothing to do with it; I got $4 for the tools I hired to them; that was 60 or 75 feet easterly of the cut, and I think 80 feet from Caine's cabin; the shaft was sunk about 23 feet; it was just a perpendicular hole run down and then drifted each
49 way to strike the indication of vein, and sunk on the vein on the north side; the next work on the shaft was in July or August; I worked a little in it, I think four days altogether; I worked with Mr. Caine, and I think Fitzgerald, and I think I worked one day on the Lady of the Lake, and three days on the shaft itself; I believe Mr. Harrington kept my time; I remember Morgan and some strangers whose names I don't know, came out, I think after I worked; I am quite sure Caine and the balance of them worked after I quit; I cannot tell how long; I believe the shaft was sunk 20 or 25 or 30 feet; it was not 23 feet deep when we commenced, for it had caved; I don't state it was the same shaft; it was just about the same place, and nobody can tell whether it was the same place or not; the shaft is not open, it is caved; the deepest it was sunk afterward by other parties before it last caved, was, I think, 35 or 40 feet; I became agent for the Parleys Park owners August 18, 1878; in October, 1878, I did several days' work in the cut run in 1877; at my own request; nobody had paid me yet; I claim they have not paid me; I directed myself to do the work; I paid Mr. Shelton and Mr. Clancy; one is in Park City, and I don't know where the other is; I probably did eight or nine days' work there; I worked alone; no one worked with me; I was living in the cabin at the time, probably 100 feet from there; it had probably taken 15 or 16 days the year before to run the cut, but I guess, most of the time I had three or four men working with me; I employed myself; I was agent at the time; I believe I worked eight or nine days continually; Shelton worked on the house I had improved and repaired; I don't remember where Clancy worked; he was alone and did not do much; Shelton shingled and plastered

the house; I think it was in October or November, but am not positive; I kept the time, but have not got it with me; I have
50 kept my time, but there is no memorandum to specify the work I have done at any place; I have a memorandum showing the work done by me in October; I never got paid for that work—that is, I claim it is not paid; there is a suit pending, and I don't know whether I am entitled to it or not; I don't know where Clancy worked, nor even what he did; I don't know how many days Shelton worked on the house; I paid him $17 or $18; I believe I paid him three dollars and a half per day; I don't know whether it appears in my book, or whether Clancy's time does; I think it does though; I don't know who worked with Shelton on the house; I was there and might have helped a little; I don't know who worked with Clancy, or whether he worked or not; I will bring the time-book in on Monday; I believe I have got it here.

JOHN ANGROVE, sworn for plaintiffs, testified:

I have lived in Park City since 1871, but have been away—was back in Colorado; I was in Park City in 1872, and knew the Parleys Park claim a little after the location, in 1872; I know where the discovery shaft is, and was there in 1872, and it was about eight feet deep; Mr. Harrington, the locator, sunk it; I had an interest with Mike Dressy, Mike Cullen, and one or two others in a mining claim near there; Mr. Marchant was one of the parties; the claim was called the Brockie; we located it a little after the Parleys Park was located, on the ridge east, right on the northeast corner patent stake of the Ontario, and about 75 feet east of the discovery shaft of the Parleys Park; I discovered a vein there on the surface; we sunk down on it a little; there were six of us in company; they all got scattered around, and I suppose the thing was abandoned; I know there was a vein there, for we had an assay made which went six or eight dollars in silver; I have been a miner since I was 14 years old, and I am about 40 now.

51 DAVID MARCHANT, sworn for plaintiffs, testified:

In 1872 I lived in Parleys Park and was prospecting; I knew the Parleys Park claim; it was on the hill east of the Ontario discovery; I know where the discovery shaft of the Parleys Park claim was, it was a little to the left of the trail, pretty near to the top of the hill; I saw the shaft a short time after it had been sunk; it was in the fall of the year after the discovery of the Ontario; I believe I once saw Mr. Harrington at the shaft, he had just come out of the hole and was walking toward the camp; it was then from eight to ten feet deep; the notice of the claim was on a board six or eight feet from the shaft in an easterly direction; I was camped on the lake flat just beyond the shaft and remained there until the Ontario boarding house was finished, and then went to the Ontario before snow fell; it must have been in September that I went up to

the flat; I saw the shaft before I went to the flat and directly after the discovery of the Ontario; there was work done there in 1874; all along in the middle or latter part of July, I should judge, and from that into August, I saw Hank Langford and he told me he had been up there at work; I did not see any one at work there; I saw the shaft in 1874, and there had been work done since 1872; I saw it in the fall of 1874; it was then about 15 feet deep, I should judge; there were three sets of timbers and two lengths of lagging, as near as I could tell; I recollect that work was done in 1874, for I was passing to and fro there, and any person would notice the dump; I was working at mining and know the value of mining labor and what was being paid for wages; the work on that shaft could have been accomplished for about six dollars per foot including the timbering; I have passed the shaft and noticed it since 1874, and I think it has been sunk deeper than it was then; I was one of the locators of the Brockie; it was located in the fall of 1872,
52 after the location of the Parleys Park; it was located on the croppings of a vein 70 or 75 feet from the Parleys Park discovery shaft, a little on the decline of the hill towards the Ontario—near the crown of the hill; I have frequently been over the ground embraced in the Parleys Park claim; was over it before ever there was an Ontario.

ROBERT A. WADDELL recalled for plaintiffs:

At the time of the conversation with Mr. Harrington at the shaft he stated where his claim lay; he pointed up the hill and said it ran through in that direction: he pointed eastward about toward the whim house in defining to me the direction of his vein; there was a vein at the shaft where he was working; up the hill there was no hole sunk, and no vein appearing at the surface; there is a vein in the Parleys Park appearing at other places than the discovery, and at a distance of 120 or 130 feet; it is nearly a due east and west vein; it is somewhat broken up and shows in three places in all and the course is nearly direct to the discovery shaft.

ANDREW LINDSEY recalled for plaintiffs:

There was the appearance of a vein in the discovery shaft in 1872; it was very mineralified, you know, mixed up with decomposed quartz, and looked like it might assay five or six, or seven dollars—something like that; I think it was about five or six inches wide; it was pitching a little to the north or northwest: you could see the seam on both sides, and see it by standing on either side and looking across; the filling was soft and decomposed; the walls were hard; in 1874 I knew the shaft to be over 35 feet deep; you could see the vein as far as you could look down—as far as daylight would shine on it; I thought of relocating it in 1875 if I could get a chance, and watched the shaft; when I was first examined I
53 stated that Langford and Morey were at work in 1874 on the whim shaft; I made a mistake; I have thought the matter

over, and am satisfied the whim shaft was not then started, and they were at work on the discovery shaft.

JOHN SESSONS, sworn for the plaintiffs:

I have been familiar with the Uintah Mining District since 1872; I commenced mining the 1st of June, and have been there in the Blue Ledge District, which lies east of Uintah, ever since; I have been recorder of Blue Ledge District since 1874, and I have worked prospects myself; I know the Parleys Park mining claim, and where the discovery shaft is; I first saw it in 1874; no one was working there, and I just went and looked at it; I should say the size was about 4 or 4½ by 5 feet, and between 20 and 25 feet deep; it was in the summer of 1874—maybe the last of June or first of July; it did not look as if work had been done right lately; I believe it was timbered the first time I saw it; there was a windlass there; I saw stuff that looked as though it came out of a vein—decomposed quartz; the board with the notice on it stood right on the south side of the shaft; in 1878 I saw men working on the claim east of the whim shaft where Harrington used to work; I think it was in July or August; I don't know any of the men who worked, except Mr. Coullard; I would say they were working there a week sure, but I don't know how long they did work.

Cross-examined:

I think it was June or July, 1874; I saw the discovery shaft; that was the first time I passed there; I was going down to see the Ontario mine; I have no memorandum to fix the time; the shaft did not look as if there had been right fresh work.

CHARLES BORBRIDGE, sworn for plaintiffs:

54 I have been a miner quite a number of years, and have done some work in the Uintah Mining District; I know the Parleys Park claim; I went to the claim with Mr. Harrington in May, 1875; he showed me the discovery shaft; there was a board there with a stake; I think the shaft was about 30 feet above the old trail which runs from above the Ontario boarding house over toward the lake; I know where the whim house is; I started that shaft myself; from this the discovery shaft would be about 200 feet west, toward the Ontario workings; I worked under Mr. Harrington's direction; he told me to work in the old discovery shaft until I got orders to go and open a new one; when I commenced working on the discovery shaft I judged it to be about 20 feet deep—might be more, might be less; there was but one man, O'Donnell, worked with me in the discovery shaft; I commenced work May 15, and judge I worked on this shaft until about the 15th of June, or somewhere about that; I thought the whole depth when I quit was between 38 and 40 feet; O'Donnell worked with me the whole time; we worked about a month; I judge the work we done cost about $200, $4 a day, you can figure it; the upper part of the shaft

looked pretty solid, and, I should judge, was worth, to sink, $7 or $8 per foot: if some men had to do it, it would cost more; we sunk it 18 or 20 feet—not over 20, and I judge it to be 18; it look to me as if the lower part was as easy as the upper part—not much difference, only to do a little more hoisting; I saw a vein there; on top it would run from 4 to 12 inches; I think on the right hand side it was 12 inches near the top, and on top it looked like a little red iron rock; the vein appeared in the walls of the shaft to the top, and some of it did not look so very bad—looked like there would be something in it; the vein appeared all the way down the shaft; it run tolerably near straignt for 20 or 22
55 feet, then it dipped off to the north; down about 22 or 23 feet another seam came in with more porphyry in it, and joined the upper seam, and it then continued the regular course, and from the place they joined it was all ledge matter, the whole thing being about five feet wide. It was all, from the junction down, ledge matter or vein matter; it was a poor quality. Of course I don't say it was pay ore. The second stratum came in beneath the other, and pitched the same way, only a little more to the north. I struck into the vein first myself; both walls were quartzite; the vein ran about east and west. We quit work about the 15th, maybe the 12th, of June on this shaft; then I went to work on the incline. I commenced it, but first run a cut and found the vein. It was my opinion it was the same vein that was in the discovery shaft. I guess I helped sink the incline about 20 feet on the vein, which could be seen all the way down. I think I quit work there about the 5th or 6th of July. Harrington, myself, and two more worked there, and Harrington had another man he brought from Salt Lake City. The incline was five by eight feet; I think the timbers were four by six. It might have cost $10 or $12 per foot—$10, anyhow. As far as I went it cost about $10. We had a good deal of trouble to keep the dirt up. Harrington pointed out some of the stakes of the claim, and we went to look for more, but did not find them; it was too late in the evening. He first pointed out the northeast stake and then the southeast one. He said: "I want you to-morrow to just take a pick and shovel and go to work and build a mound around that stake and put another one in." I think I did put another one in—I can't hardly say. He said: "I want that stake covered over so that nobody will pull it up." I did that. It was the southeast stake. The stakes were marked. I read
56 "Parleys Park Claim" in middling big letters, and I made out the date of it; it seems to me it was the 19th of July, 1872. Both stakes appeared to be red. I should say the northeast corner stake was 100 to 150 feet west of the Lake House; the other probably 200 feet from the Reich House, sometimes called the Lake House. The stakes were nearly east from the discovery and about 750 feet distant from it. The stake with the mound would be about 20 feet on the north side of the road from Parleys Park shaft house around towards the Lake House. The notice of the discovery was on a

board nailed to a stake standing about 8 feet from the shaft. I read the notice, the name of the claim, and date—it was plainer than on the stake, but seemed pretty old. I think the date was July 19, 1872. I think the notice claimed 1,500 feet. Harrington's name was on it, but I don't remember the others.

Cross-examined:

I made the mound around the stake a few days after I went there in May, 1875. I am pretty sure I went to work on the discovery shaft the 15th of May, 1875.

SHEPPERD MCFADDEN, sworn for plaintiffs, says:

I have been familiar with the country about Park City since 1876; I have been keeping a boarding house, mining and prospecting; I know Harrington and the Parleys Park mining claim; I saw some stakes, I would suppose, about the west end of the Parleys Park, and I am quite familiar with the stakes on the east end of it; I saw the stakes the first time I went up there in 1876; what I have always been told where the stakes on the west end were just below the whim house, down the hill a short distance toward the Ontario boarding house, down the trail we generally used going up and down the hill; I supposed they were probably 100 feet up the hill from the Ontario boarding house in a southeasterly direction, almost due
57 east; I know where the discovery shaft is; it lies probably 50 or 75 feet in a northwesterly direction from the old whim house of the Parley's Park; the stake I refer to stood right on the side of the dump of this shaft; I think it was a square stake and looked as if it had been there some time; I think there were some marks on it, but I don't know what they were; I never saw any other at that end I knew as Parley's Park stakes; if I recollect right the stake was right by the dump; one stake stood below the whim house and one at the dump, and those I understood were the west end stakes; the stake at the dump I suppose was the discovery stake; I don't know where the west end stakes were; the east end stake is probably 200 feet west of the old Welch House; I saw that ever since I went there in June, 1876; it was a square stake; the other was south of that about 200 feet; I have seen it and passed it frequently; I saw it the first time I went there; these stakes are standing there yet; these stakes are south of the lake, and as the lake was originally, the northeast stake was right on the border of the south side of the lake, and rather on the easterly end of the lake; I have lived on the east side of the lake, and the northeast stake is about 10 feet from my house, and in sight; there was no timber on the ground when I went there—it had been cut off; I have seen work done on the claim frequently since I have been there; in 1876 a cut was run; there was quite a number at work, six or seven, but I only remember one named Howell, I believe Mr. Coullard had charge of the work at that time; I would not be positive about the year; it was in 1876 or 1877; the work was done in June or July; I was over

the ground in 1878; I think Caine was at work on a shaft in front of his cabin; I don't know who they were that worked with him; there was some one working on the shaft in 1878.

58 Cross-examined:

I saw a stake on the east end, and the northeast stake the first time I went there in 1876, in June or July; I am under the impression I went to Park city in 1875, but never went up the hill till 1876.

CHARLES R. JONES, sworn for plaintiffs, says:

I have resided at Park City since 1877, and I know the Parley's Park mining claim; there was work done on the claim in 1877 and 1878; in 1877, in the fall, work was done north of Caine's, and I don't know but there was work done in the summer. In 1877 the work was done in sinking a shaft—an ordinary shaft; it was started about three and a half by four or five feet. It was sunk without timber. At the time I saw it it was down 25 or 30 feet. Mr. Coullard was directing the work. I don't know who it was worked for him. In 1878, there was worked done in July. One of the men who worked for Coullard, was named Johnson. They were working on another shaft, just by the first one which had caved in. It was a little south of the first one, not over 50 or 60 feet. It may be further. Then there was work done in the winter of 1878, later. I think there was some timbering done on it. Mr. Coullard directed the work. I think the work done in 1878 was done about the 15th or 20th of July—somewhere about the middle of July; they worked there about two weeks. Then the work was resumed in the fall or winter—some work done, I think timbering. Some parties jumped the ground, and did some work about a month after the work in the winter of 1878. The work I think Coullard done was in November or December, 1878. I am a miner. I think in the discovery shaft there is what miners would call a vein. It is timbered and the lagging is out one place, and the vein runs there, and I think you can see what any
59 miner would call a vein and locate it as such. It comes near the surface.

Cross-examined:

The work in 1876 was in a shaft. I cannot tell whether the shaft was started then, or was an old shaft. I passed it three or four times passing from the McHenry. The same fall I think they timbered there. Clancy was helping Coullard. I saw them there several days. I saw a man named Mahony there later. I think it must have been after January 1, 1879. I understood he had relocated the Parleys Park. I think it was in the winter, but I could not say within two months. It was in a shaft that Clancy and Coullard were working. It was two years ago I examined the discovery shaft and saw a vein in it. One day I just stopped and looked at

it. The timbers were right up to the surface and the lagging thrown apart, and I could see what I called one wall of quartzite coming up the vein, showing there probably for eight or ten inches.

B. W. MORGAN, sworn for plaintiffs, says:

The Parleys Park Mining Company, an incorporation, is in possession of the Parleys Park, Central, and Lady of the Lake claims. The property was deeded to them in May, 1879. I am one of the directors, and have represented the company here, and have had something to do with the purchase of the property. I was first on the Parleys Park ground October 31, 1875, and just looked at the shaft that was being sunk by Harrington; he was working with a horse whim in the shaft in the whim house. The first time I examined the discovery was in 1877. My business is mining and smelting ores principally. I went into the shaft, looked at the timbering of it, and saw the vein in it. I thought there was a narrow vein there six or seven inches thick where I looked at it. The lagging had been torn out
60 15 or 20 feet. In 1878, I was there with Mr. Hall and Clark, and saw a tunnel reaching the base of the shaft. That tunnel was run off the Ontario ground to tap the bottom of the shaft. I went into the tunnel. It is run through country rock. I went through to the end of the tunnel which reached under the shaft. I saw a vein in the shaft, in the east side of it, pitching to the north. It appeared in the walls of the shaft and ran clear across it. The tunnel was a little longer than the shaft had been, and they had broken through to the east and cut up to reach the shaft. It was in that communication between the tunnel and shaft that I saw the vein. The vein in the shaft above was pitching to the north. We could see the vein in the shaft where the lagging was out.

Q. In the season of 1879, state what the company referred to did with reference to the working of their three claims.

Objected to by defendants, as immaterial and irrelevant to prove what was done upon the Parleys Park—it is immaterial to prove what they did to the three claims.

Objection overruled. Defendants except.

A. I went there in company with Mr. Frank Eastman, surveyor, and Mr. Dahlgleish to locate the shaft. Mr. Eastman had an instrument with him, and we got the corner post of the Lady of the Lake first. This was in June, 1879. We measured from that point, and got the boundaries of the Lady of the Lake, the Central, and the Parleys Park. Then located the shaft house about half way between the east end of the Ontario claim and the east end of the Lady of the Lake claim. I think Mr. Coullard was there and helped us measure it and pointed out the points. We located the hoisting works and the shaft.

Q. What was the object of the shaft.

61 Defendants object on the ground before stated.

Objection overruled.
Defendants except.

A. The object of the shaft was to develop all the property of the Parleys Park Mining Company—the Parleys Park, Central, and Lady of the Lake Claims. The object was expressed, measurements were made for that purpose. We located the shaft as near to the north side of the Lady of the Lake ground as possible for the purpose of catching the vein on the dip. We projected a shaft 600 feet deep, double compartment—one compartment 4½ by 5 feet and the other 5 by 6 feet. It was to be timbered by timbers and wall plates, about twelve inches square, and cross-timbered 12 by 14 inches, and three-inch lagging of the timbers five feet apart from centre to centre.

Q. You say the contract was let?

Same objection, ruling, and exception.

Yes; to J. J. Dahlgeish in June or the early part of July. Work was commenced the next day after the measurements, and the work continued from that time.

Q. What amount was expended prior to the 19th of July?

Objected to as above, and same ruling and exception.

I could not exactly answer, but I should say several thousand dollars. In pursuance of this plan of sinking the shaft, machinery had been purchased, boilers and engines, and everything else. Work was done on the ground to the amount of a good many hundreds of dollars—over three times three hundred dollars on the 19th of July. Work was kept up all the time, and has been continued since pretty near all the time.

All the foregoing testimony of the witness B. W. Morgan in regard to the location of and work done on the shaft on the Lady of the Lake ground was taken under defendants' objection, and
62 defendants' counsel now moved to strike the same out on the ground first stated in the objections.

The court overruled the motion, and defendants' counsel objected.

Cross-examined:

No public notice was put up or recorded touching the purpose of sinking that shaft. The Lady of the Lake was not a patented claim. The entry had been made and it was passed. The patent had not come from the Department. The shaft and work were entirely within the limits of the Lady of the Lake claim.

JOSEPH A. GORLINSKI, sworn for plaintiff, says:

I am a civil engineer and a U. S. deputy surveyor. I surveyed the Parleys Park claim for patent in March, 1876. At the season I surveyed it it was impossible to find any stakes on the ground. I employed assistance and dug through the snow, and the corners

were satisfactorily pointed out to me. At the time of survey I think the east centre stake was found by digging; none of the others. The snow was six or eight feet deep. Two or three months afterwards I became interested in the claim, and examined the boundaries, and found the stakes set by me were within close proximity of the location stakes—one within five feet and the others within sixteen or twenty feet on the same line pointed out to me. I saw the stakes lying on the ground, and they were marked Parleys Park stakes northeast and southeast; they were old stakes, and I found them after the snow had gone off. I found the northeast corner and the southeast corner, and was satisfied my survey corresponded very nearly to the location stakes. I also found the discovery stake of the Parleys Park. The wood was chopped down from the west end, and it was impossible to find the stakes there. The stake at the discovery must have been five or six feet from the dis-
63 covery shaft. There was a notice on it. Simply a post and board on it. It was legible enough, "Discovery of the Parleys Park." I have observed a vein in the discovery shaft on several occasions.

Cross-examined:

It must have been in April or May, 1876, that I purchased 50 feet in the Parleys Park; my fees had not been paid and I was induced to buy some feet in the ground.

Re-direct:

At the time I surveyed the Parleys Park I examined the record of the Switzerland notice, and there was no alteration or erasions or interlineation on the record; afterwards I examined it, and the record was interlined and partly erased as I remember; I am satisfied the change was this; it read when I first saw it: "This location is situated 140 feet southwest," &c., and as altered afterward the word "west" was erased and the word "east" interlined.

JOSEPH M. LOCKE, sworn for plaintiffs, says:

I have resided in Utah since 1874, and I am an engineer and chemist, and have had experience with mines and in mining; I have examined the discovery shaft of the Parleys Park claim; it is an old shaft and there is no means of passing down but about 20 feet; it is choked with timbers; showing from the top there is a vein on the east and west sides from 7 to 8 inches wide and pitching north at an angle of 18° and tending to a perpendicular, consequently curving with the curved side toward the north; by entering from the tunnel you are only able to get your head into the shaft; it would not be safe to go in; at the bottom I could see nothing of the vein; I could not say positively whether it was there or not, for the shaft was old and besides very dusty, but the indications at the top would be that it would pass out of the north side;
64 the formation is quartzite rock on both sides of the vein; in

the tunnel you pass through porphyry the greater portion of the tunnel; the filling of the vein is what I term matter; it is brecciated matter at the top—quartzose matter with iron stain; I should say it was a very good indication for ore; I should call it a mineral vein, that is, in the miner's acceptation of the term; it is marked so as to be distinguishable from the enclosing rock by color and texture, and it is distinct in the walls and well marked; the vein is a little narrower on the west side than on the east side of the shaft, and its course is easterly and westerly.

Q. State whether or not that was such a vein as a miner discovering it would be likely to follow with the reasonable expectation of finding paying ore?

Objected to as incompetent and not the subject of an opinion for an expert.

Objection overruled; defendants except.

A. I would consider it a good indication to follow; I found indications of a vein east and west of the discovery shaft, but no connection with it; it was covered with soil too much for tracing; at points I saw what I supposed to be the same vein, but I do not say it was the same, because I was not able to make the actual connection, but my opinion was it was the same vein; I found the indications more particularly eastward, off towards the whim house; they were near to the whim house; a prolongation of the course of the vein as shown at the shaft would run in the direction of the whim house.

NICHOLAS TREWICK, sworn for plaintiffs, says:

I have been a miner for 18 years, and for nine years in Utah as miner, prospector, foreman and superintendent of mines; I am acquainted with various mining districts of the country; I have never made but one visit to the Park, and that was last Monday; I think I know a mineral vein when I see it; I visited the
65 Parleys Park claim last Monday. I went with Col. Locke and James Clark, and examined the discovery shaft. It is sunk down, I should judge, a distance of 45 or 50 feet, and runs down on the vein, the course of which is about east and west, and from six to twelve inches wide, and cased in quartzite. The shaft was not in such condition that a person could go down through it, and could only make an examination from the top. I could look down very plainly 35 or 40 feet, and for that distance the vein was visible. The shaft is probably five by four feet, the longest course of the shaft being on the course of the vein. Below where Icould see the vein the timbers and some ground seemed to have dropped in bodily and filled up the bottom. I examined a tunnel that is run in from the south side, that is running north, apparently to tap the bottom of this shaft, which has been done. The tunnel was in, I should judge, a distance of 100 or 125 feet, passing through quartzite into porphyry and from porphyry again into quartzite, where

this vein is encased. The country surrounding the bottom of the shaft is quartzite. The prevailing formation seems to be quartzite, and it comes to the surface. There is very little debris at the discovery point. In fact, the croppings of the vein are standing out on the east side of the shaft. The vein comes to the surface, though on the west side there is a little more debris. On the east side it stands out and there is an iron-stained bowlder there that would attract attention. As a miner, I consider there is a vein in that shaft —a mineral vein, and would be likely to follow it. The filling is quartz impregnated with iron—a kind of brecciated matter, differing in appearance from the country rock; and the materia' is different—it is a porous, quartz-like, iron-stained, and softer than the country rock. In my opinion it is a mineral vein. It has walls—
that is, the vein is from six to twelve inches wide. After you
66 cross the vein, you get into solid quartz. The vein has a dip of about 18° from vertical.

Q. State whether in your opinion, a miner would follow such an indication as that with a reasonable expectation of getting ore.

Objected to, as immaterial and not a subject for opinion.
Objection overruled, and defendants except.

A. Yes, sir. I think if I had been passing over that country, I would have been likely to locate that and follow it for some distance.

Q. If that vein was as you described it at the top, and if at the bottom, say 40 feet, more or less, it should have widened out to a width of three or four feet, what then would have been your judgment as to what it was.

Objected to by defendants, as basing the opinion on a hyyothetical case.
Objection overruled. Defendants except.

A. It would have certainly been an indication that the vein was growing stronger as depth was attained. I examined the ground west of the discovery, and near the west end there is a hole sunk down six or eight feet deep and about six feet square on very fine croppings. It is quartz, very heavily charged with iron—porous—some vegetable stain—the rock is very porous with some very good iron—what I call iron rock. That is a very good indication of the precious metals. There are very strong croppings in the vicinity of the cabin just north of the whim house. Some work has been done there showing manganese and iron, and quartz very heavily stained. I should judge this was 45 or 50 feet north of the whim house, and right on top of the ridge, and I should say that, though broken up, it was in place, because it would not be liable to roll up the hill. I examined the ground at the northeast Ontario stake and
all along the ridge for 100 feet, and there are very strong
67 mineral indications, consisting of iron, quartz, and clay material, differing from the surrounding country. The surrounding country is quartzite, more solid and gray in appearance.

A chunk of this vein matter is all porous and full of iron. The course of the vein in the discovery shaft is magnetic east and west, and the indications east and west which I have named are on the same course.

WILLIAM A. STANTON, sworn for plaintiffs, says:

I examined the Parleys Park shaft in company with other witnesses; I went over the grounds first with Mr. Clark and Mr. Van Duesen; then we got a rope and a couple of men, and I went down the shaft about 20 feet and took a sample of the ore about 20 feet down; then came up and took a sample on the east side at the croppings; then we went down to the tunnel and could not get in there on account of the broken timber and mass of stuff that had caved down; the vein was very distinct and about 20 feet down I should judge it was 12 to 14 inches wide; It looked a well defined vein on both sides, dipping very near perpendicular; the walls are quartzite; I could not see more than three or four feet below where I went; the vein matter differed from the country rock, it was vein matter, quartz mixture, iron stains through it, and softer than the country rock; I picked out some of it with a small pick; the vein matter is soft mixed up with hard quartz, and it is fine down there where I was—it is course at the croppings; I would think it was a vein of ore.

Q. State whether in your opinion it is such a vein as a miner would follow for the purpose of obtaining valuable ore.

Objected to by defendants, as immaterial and not a subject matter for opinion.

Objection overruled, and defendants except.

68 A. Yes, sir; I would follow it as a miner; I did not get into the bottom of the shaft from the tunnel; I saw indications of the same vein east of the shaft about 60 feet, I guess.

Q. What did you see at that point?

DEFENDANTS' COUNSEL: We object if it is claimed it is offered to show a discovery or help to make a discovery. It is simply to show continuity, we don't object.

THE REFEREE: It is for the purpose of showing continuity as I understand it.

PLAINTIFFS' COUNSEL: We don't wish to be understood as acceding to that.

PLAINTIFFS' COUNSEL: We object to this question so far as it may be intended as proof of a discovery at any other than the discovery point, and move to strike out all the testimony of the witnesses, Locke, Trewick, and the witness now on the stand, touching indications of a vein at other points than the discovery point.

REFEREE: The objection and motion are overruled, and the testimony permitted to stand for the purpose of showing continuity of the vein testified to at the discovery point.

A. I saw small holes sunk there, might be three or four feet deep, and indications of mineral stains; It is a hole I believe known as the Brockie; west of the discovery shaft and up the hill 250 or 300 feet north from the Ontario location, I found a hole about eight feet deep with vein matter in it—iron stains and manganese; the country rock is principaly quartzite.

Cross-examined:

Ore is a mineral bearing rock.

B. B. VAN DEUSEN, sworn for plaintiffs, says:

My business is engineering and mining; I have been familiar with mining about four years, and I am familiar with mines and vein formations; I visited the Parleys Park claim last Mon-
69 day in company with other witnesses; the shaft I should judge is about 60 feet deep and about six by eight square, the long way east and west, showing on the east and west sides of the shaft a small vein from 8 to 12 inches wide; we could distinctly see this vein about 20 feet deep; further than that there were old timbers, debris, &c., and we could not see it; you can trace the vein clear to the surface, separate and distinct from the surrounding country, which is hard vitreous quartzite; the vein is broken quartz heavily stained with iron, appearing in both sides of the shaft, with a course magnetic east and west, and a dip a little to the north, perhaps 75 or 80 degrees from a horizontal; I should regard it as a mineral bearing vein.

Q. Is it or not such a vein as a miner would follow expecting to obtain valuable ore?

Objected to. Objection overruled, and defendants except.

A. Yes, sir. I passed over the ground both ways, east and west, from this shaft. Sixty or seventy-five feet east of the shaft we found indications of vein matter. There is a hole sunk 6 to 8 feet deep. The quartz there is strongly impregnated with iron. Some 400 or 500 feet west we found the same indications in the direction pointed out by the course of the vein. There was no continuous tracing of the vein. It was only these points we saw, and I should regard them on the same vein. I went into the tunnel and came to the bottom of the shaft, but had no satisfactory examination of it on account of the old timbers from above, which had fallen down.

Cross-examined:

I am not familiar with Parleys Park at all. I only looked down the shaft, and could see about 20 feet; from there the view was intercepted by the old timbers which had fallen in. I was
70 not able to explore from the bottom up at all. The bottom was literally filled with old debris. The vein matter found was finely granular and more broken and porous—porous quartz.

I think it was quartz which had been originally strongly impregnated with iron pyrites, and the sulphur leaching out, leaves the iron stain in it, and leaves it porous. It differs somewhat in texture from the rock adjacent. The fragments found in the vein are finer than the country rock, granular in texture, and I think they also differ in color.

EDWARD J. HALL, sworn for plaintiffs, says:

I have been mining about 20 years. I have examined the discovery shaft of the Parleys Park three or four times in company with other parties; the last time was about the 9th of May last, and I have never been down entirely through the shaft. I have been down part way through, and been up to meet it from the other end, making nearly the circle through it. On the surface at the collar of the shaft the vein is very fairly marked for a discovery in Park City in quartzite. In that country the croppings do not come out as prominently as in lead districts, but I consider it a very honorable discovery, with a well-marked lead. The vein at the surface, I think, would hardly be a foot wide—what we might call the vein proper. The walls on the surface are quartzite on both sides. The vein filling is composed of broken-up quartz and iron-stained material that goes to carry mineral in that country. The vein is well defined, encased between walls, and stained with mineral matter. Of course it is very hard to determine, in looking at quartz, what value it has. The country is quartzite, while the vein is broken up and seems to carry mineral—to the eye at any rate. I should call it a vein, and a very fair one. Its course in the shaft seems to be east and west. The dip is slightly to the north. I only went down 15 or 16 feet, and as far as
71 I went the vein was continuous, and as well marked where I left off as at the surface, except that it appeared to be a little smaller. The vein was well defined, and the stained matter could be observed easily. I went down and came up from below. Looking at it with the eye, I should say the shaft is 50 or 60 feet deep. As we passed in through the little horizontal drift at the bottom the vein seemed to take a little slight turn and dip a little to the south. There seems to be a kind of lapping or displacement. About ten feet back of the level there was a splice that made it appear to dip to the south a little. For the first 10 or 15 feet I don't think the vein is as strong as it is above; in fact, looking at the course of the vein, it is hard to determine as to its value except by the stains. As far as I went up the vein was perfectly visible, but smaller than above; and at this point, where it made a southerly inclination, there was a kind of splice set in, which would leave it undetermined which way the dip was. It was clear to us as we went down the shaft, and also to the parties that had driven in the level and connected on the other side.

Q. From your experience as a miner, was that such a vein as a miner would follow with the expectation of finding ore?

Objected to by defendants. Objection overruled, and defendants except.

A. In Uintah Mining District, I call it one of the finest discoveries in the country, except the Ontario, because these quartz formations leached out, and don't show like they do in argentiferous countries. I call it about as good a discovery as there is in the camp. I have examined the ground both easterly and westerly from the discovery. At the westerly end of the claim the showing is very strong, and from the course of the indications on the surface they would appear to be one vein. The indications there are
72 stronger than at the discovery; the walls are quartzite and the vein is quartz, very much more heavily stained with iron than it was at the discovery point. The croppings there come to the surface, and were visible last June.

NICHOLAS TREWICK, recalled for plaintiffs:

I have with me the samples I took. This is from the discovery shaft in the east side of the shaft in the vein—both these pieces. That is the country rock it was encased in. This is from about 200 feet north of the discovery of the Ontario in that hole on the west line of the Parleys Park claim.

JOSEPH A. COULLARD, recalled for plaintiffs:

I have examined the bottom of the discovery shaft several times when I have been in the tunnel. I examined that place very thoroughly. The vein is about the same in the bottom as on the surface, except that it is probably a little wider, and the quartz is more compact—bigger chunks—than on the surface. It gives the appearance there that it has broken up, and the vein to my understanding has changed there in dip to the south near by that porphyry. I am sure it is wider, and the vein more compact. It looks better—the quartz is better in appearance.

Cross-examined:

I examined it several times to see how it lays and what was the material of the vein at that point. It is between 40 and 50 feet deep, I should judge. I have measured the ground from the surface. I believe I was employed by the Parleys Park Company from the 13th of August to the 26th day of November in 1878. I did some work cleaning out the cut in October or November. I believe that is all the work I done on the claim while I was agent, except a little repairing or covering the cabin. I testified that the value of my work in the cut and on the house was about $35. I paid
73 another person $17 or $18, and another $20 or $25. I had a suit to recover for my services as agent, and I might have testified I was employed as agent or superintendent to see to doing assessment work on the Kitty Walker, Joe Walker, Parleys Park, No. 2 and No. 3, and that the work on the Parleys Park had been previously done.

R. J. JOHNSON, sworn for plaintiffs:

I am a miner and live in Park City. I know the Parleys Park claim and the discovery shaft. I saw it yesterday morning, and there were several of us there. I went to see if the opinion I had formed of it in 1875 was the same to-day. I saw it in 1875, when Mr. Harrington worked it—in June or July, if I remember right. I have worked at mining since 1872. There is a vein in the shaft, carrying mineral, 8 or 10 inches wide, for a depth of 20 feet. When I was there in 1875 it was down 10 or 12 feet. It was plain there. I could not see the bottom of it yesterday.

Q. State from your experience whether that is such a vein as a miner would follow with the expectation of finding ore.

Objected to. Objection overruled, and defendants except.

A. Yes, sir; there is.

ROSWELL HUTCHINS, sworn for plaintiffs:

I have been engaged in mining 30 years, and about nine in Utah, and have had experience and examined mines in different camps. I know the Parleys Park claim. I never was at the discovery shaft but once, and then did not examine it much. I saw in it what I call a vein. I took none of the ore out. I once helped James Clark make a measurement from some point on Parleys Park to the Ontario discovery, and my recollection is it was about 200 feet. At the point from which we measured there were strong indications
of a vein. There were iron, quartz, honeycomb quartz, and
74 the appearance of a vein. I thought it was on the same vein
the discovery was. I think some of those indications were above the surface.

Cross-examination:

I think it was this spring that I noticed the discovery shaft first, and noticed there was a vein in it.

JAMES CLARK, sworn for plaintiffs:

I am familiar with the Parleys Park claim and the workings on it, particularly for the last four months, and before that, generally for several years. I am a miner, and familiar with mines and mineral formations in this territory, and have made the subject a study, and for several months I have made the Parleys Park and the work on it a matter of special examination. I have examined the discovery shaft. The size of the shaft is, I think, eight feet; near eight feet at the surface and probably will continue that to the bottom. I have been through the shaft, up and down, and measured it. The width of it will probably be about four and a half feet, and the depth about 46 or 47 feet from the surface, as near as my memory serves me. The dip is generally to the north, and at an angle of about 18° from vertical, until it reaches the bottom; then it is nearly perpendicular and turns back on itself. The strongest part

of the vein, although their is a deviation of the vein, a slice going away to the north, but the strongest portion of it is towards the foot, making it nearly vertical for about 10 or 12 feet. The size of what they call the vein is not far from ten inches, I think, on an average, to that point indicated near the bottom, where the bend occurs. Below that it is probably not over three or four inches. The enclosing rock is quartzite. The vein itself would come under the general term of vein matter. It is a brecciated matter, and largely composed of quartz. I call it vein quartz, and occurs with the ordinary clays and soft matter
75 found in a vein. It could hardly be expressed. If it was analyzed it probably would not be found clay, because it would be more quartz almunia, and just in that condition which is generally on the selvage of a vein, but entirely different in appearance and character, and in every way, from the surrounding rock. It is not, by any means, simply ground up quartzite-country rock. It is made of different materials, in my judgment. I know the difference between quartz and quartzite. Ten or twelve feet from the bottom the vein seems to split; a portion of it dips a little to the south; the widest and strongest vein inclines to a perpendicular, the inclination of the vein being to the north. That would naturally dip into the foot wall. At the surface the indication of the vein in the distinct outcrop of quartz and brecciated quartz cemented with iron, and occurs on each side of the shaft and at surface on top of the vein. That continues down through the shaft, but the difference is this: that the one is solidified and the other is more like a cement or conglomerate. The continuation then down the incline of that vein is loose vein matter; you can pick it out with your hands. At the top it is broken quartz, cemented with iron, I judge, and in place at the surface at each end of the shaft, and occurring only on top of the vein.

Q. Is that vein such an indication that a miner would follow it with expectation of finding valuable ores?

Objected to by defendant. Objection overruled, and defendants except.

A. Yes, sir; it is better than is generally found in the Park, and followed—that is, so far as I understand mineral locations to occur there—where locations are made there as mineral locations. That is far superior to a great many that have been made and accepted since.

I have examined the ground at other points with reference
76 to finding a continuation of the vein in the shaft, the course of which is nearly magnetic east and west. Although near the summit of the hill, the ground is covered with a good deal of loose dirt, and it is very hard to continue the outcrop of the vein. It may occur in a continuous line, but I have not observed to connect it, but there are very prominent indications that the vein continues in the direction that that course lies in—that is, on the strike of it. The indications along the surface are the outcrop of quartz,

stained with iron, similar to what the outcrop at the discovery shaft is—very much the same—and occurring in several places, especially to the westward, continuing along that distance very near to the end line of the location; the west end line and the points that have been found containing mineral, and worked on in the location, occur—three of them—to the eastward about 175 feet, and I would think that to the westward there is one lacation there that would be nearly north, magnetic, of that point. Within these side lines, the distance between that and that, (referring to the map,) being 230 feet, I should judge; on the horizontal it would be about 255 feet. At that point there is a very strong outcrop of iron and iron rock, or it might be differently termed. It is pure vein quartz for a considerable width there, probably ten or twelve inches, heavily charged with iron. The quartz is clear and chrystaline, very frequently containing quite large chrystals, mixed with this iron gangue, while it assumes the nature of an ochre at the top, and is formed, going down, similar to the ordinary iron rock found here in Tintic. Some places you might probably get 50 per cent. iron. Such matter as that never constitutes country formation. It belongs to a vein, or should belong to a vein, or it would not have the opportunity to that formation, the chrystalization. The country being a solid mass of rock in that particular point, there can be no op-
77 portunity for that to be the prevailing country there, because it is distinctly different. It also shows the fissurizing in the country in places, in which the matter is found. This fissurizing is in the most westerly opening of the location. There is a distinct fissure shown in the formation at that point. The fissure comes to the surface at the present time; the soil may have been washed off since the discovery was made—it was only a few inches thick. Where the vein is found in the excavation there it comes up to the grass roots, and just south of that the outcrop extends a foot or eighteen inches above the surface. It is on the south side of the vein. The pitch of the vein is a little to the south there. This is at the most westerly point on the surface that has been worked, and is 500 or 600 feet from the discovery shaft. The distance of 255 feet I mentioned is north of the Ontario discovery, and about 40 feen inside the north side line of the Parleys Park claim. My attention was particularly called to these indications last spring, but I had noticed the ores to the eastward before. I have visited the ground for examinations, probably half a dozen times. These indications are such a length from the discovery that I would not be sure they are on the same vein, but the course indicated in the shaft, and in the vein there are very nearly on a line—nearly east and west within a point as near as I can judge; that is, as near as I would expect a ledge to run—that is the course of the country and the veins through it there—they correspond also to the north of there. All these locations, the Barrios, and several more there, conform to that general run of the country—the strike of the veins—in that way I consider it might be a parallel vein, but it was

possible to be on the same vein discovered in the Parleys Park. I have examined the ground to the eastward of the discovery shaft with reference to ascertaining whether there is any vein to
78 be found in the ground. The next point opened on the ground is about 175 feet from the northeast corner stake of the Ontario—I measured it the other day. There are three openings, one directly adjoining the northeast corner stake of the Ontario, and probably 30 or 40 feet north of what is called the whim house. The centre of the excavation is not more than 10 feet from the stake. There are two other points probably 25 feet in that direction, one north and the other northeast. There is very strong evidence of minerals in the three holes, and occurring so close together I would consider they were the outcrop of a pretty strong vein. There is every indication of a strong course of mineral ground or mineral vein going through there and corresponding to the character of the material that the Ontario was located on. That is, there is an ochrey earth occurring there in large quantities and very strongly colored with iron. Then there is quartz in place there in line conforming to the lines of the vein through the shaft. There is quartz in place heavily impregnated with manganese and iron, so much stained as to almost obscure the quartz in the vein. Some of it is as black as manganese can get associated with iron and vein quartz. These materials are not country formations—they belong strictly to vein formations. Iron quartz and manganese are minerals. From the direction of the points at which these indications are disclosed I would consider they are on the same vein in the discovery shaft, and probably belong to the same fissure. I went through the tunnel that caps the discovery shaft. It is driven through a pretty loose country rock. The quartzite there has been dislocated, and there is earthy material occurring in the crevices made by the movement of the ground. It is so loose that there has been a continual line of timbering the greater part of the distance until you enter the ground at the bottom of the shaft, which is strong
79 enough to support itself, that ground within about 10 or 12 feet of the bottom of the shaft. There is a chunk of porphyry came in there, and be yond that the ground to the vein is solid quartzite. The south wall of the vein is composed of quartzite backed by porphyry. The north wall is quartzite, which has not been cut through. I have been down in the Switzerland shaft a short distance; not to the bottom of it. I believe I went through the level that is cut by the Como Tunnel to the bottom, or very near to the bottom. I could see where the Switzerland shaft was located where the bottom came down. The Como Tunnel is now entirely in quartzite, as far as I could see. I did not observe any porphyry throughout the workings of the Como Tunnel, or eastward on the vein where the tunnel taps it, and from there to the Switzerland. I do not know of any porphyry to the eastward, except the indication at what is called the old Brockie shaft, and there it is not

strong enough to say that it is in place, but there are specimens of green stone porphyry there very strong, and also disintegrated porphyry adjoining the location of the old Brockie shaft. That is the first point it is seen at, and the next is immediately west of the Switzerland shaft, in the first open cut, 40 or 50 feet from the shaft. There is a vein there apparently in the bottom of that cut, just on the south end, and apparently the vein that cuts through the Switzerland shaft, having the same strike and dip, but not exactly the same appearance. It passes from the quartzite into the porphyritic formation, but so much decomposed you would hardly recognize the rock, only that you would find large portions of porphyritic clay, kaoline, or whatever it might be called, but very distinct clay, and the structure of the rock that formerly composed that ground is entirely lost by its decomposition, as it appeared at the east end of the claim. There are two veins apparently there, one the
80 Ontario, and possibly within the Ontario lines, and the other in the Parleys Park. I would judge from indications the vein in the Parleys Park would continue for possiby 700 feet. From this point I have indicated here, that is the furtherest point along the line, there is an evident outcrop of mineral for that distance—about 500 feet—and then from that point to this, the furtherest easterly indication would be about 175 feet. That would be about 675 feet, or possibly 700 feet, more or less; but there is no connection between this shaft and these indications here. No development of mineral only by the natural way by the outcrop of the vein. It has not been traced either under ground or on top by the work. Assuming that to be the same vein, it is coincident to the course and within the lines of the locations as shown on the map there. I have taken several samples all the way from the top to the bottom of the shaft. I don't remember the dates, and I have not taken any lately. The samples were assayed by Mr. Meader here. I took them there myself. I returned the certificate to the office of the company. Since that I have not seen them, but I remember of them containing several ounces or dollars—I have forgotten now. Since then I have taken samples from the surface and had them aasayed by Mr. Hodges. They were from the several points I have mentioned where mineral indications occurred. I got certificates and gave them to the office of the company.

RICHARD GRANT, sworn for plaintiffs:

I have been a miner 25 or 26 years, and in Utah since 1873, and a little over five years in the Uintah Mining District. I have worked on the Ontario principally, and a few prospects of my own. I know the Parleys Park mining claim and the discovery shaft. I have been there off and on, but never knew where the discovery shaft was until yesterday. I have seen the shaft and was
81 acquainted with its location. Yesterday I examined it for the first time. I saw mineral as far as I could look down, somewhere in the neighborhood of 20 feet—vein matter; that I call vein

matter; in the neighborhoad of from ten to twelve inches, or towards two feet probably, in or about there. The vein matter cropped to the surface, and as far as I could see down to a set of timbers, about 20 feet, 15 to 20 feet down. The lower part of the shaft was caved in and I could not see below this set of timbers, but from that out to the surface the vein is plain to be seen, and vein matter. I did not have it assayed, and don't know what is in it, but it is vein matter. I know it from my experience going around that country striking prospects; I know vein matter from what they call country rock. The vein came to the surface.

Q. Can you state from your knowledge as a miner whether that vein which you described is such a vein as a miner would follow with the expectation of finding valuable ore?

Objected to by defendant. Objection overruled; defendants except.

A. Yes, sir; I believe he would follow it on the expectation of finding a mine. It is what I call a good showing for a prospect. I think the vein was running nearly east and west as far as I know. I was a little both ways from the discovery shaft, and I could not see any regular vein any more than I saw what you would call a mineral stain off there—nothing as regular as this in the discovery shaft. There are several places that you see a kind of blow-out of vein matter, but cannot see anything defined about it. This was pretty well defined in the discovery shaft, but no other place that I could see. I could not say about those other points running into the shaft; they might run into it for all that I know. They were not traced so I could tell whether they were the same thing
82 or not. They were in the boundaries of the same location. I saw in these other holes what some people might call vein matter, and I could not say that it was not vein matter. It looked very much like it; it was a kind of poor quality, but it looked to me more like vein matter—like what we call a blow-out—something to that effect. There were indications around these holes that men had started in to look for a vein. I say providing I found one of those holes I would start and hunt up to see where the vein was; still there was no vein in those holes, but there were indications for having a vein around there—such indications as a miner would follow. I would hunt around there and run cuts to see where the vein was. The country formation is quartzite principally—quartzite and porphyry. The enclosing rock of the vein is quartzite. There is plenty of porphyry in the Ontario mine on the south side, on the foot wall; occasionally there is some on the north side, mixed up with the quartzite.

Q. How do the indications of this vein as to ore at the surface compare with the indications of other mines there at the surface in that district?

Objected to by defendants, as immaterial, irrelevant, and incompetent. Objection overruled; defendants except.

A. The indications are good so far as prospects go with other prospects around in reference to it.

Cross-examined:

I left the Ontario mine the latter part of last March, and I never examined the Parleys Park discovery shaft until yesterday.

It was here admitted by counsel and stipulated that the ground in dispute is in Summit county, Uintah Mining District; also that the Lady of the Lake was entered and paid for at the land office September 18, 1876.

83 Defendants' counsel here moved to strike out the testimony of Benj. W. Morgan as to the shaft projected and sunk on the Lady of the Lake, on the grounds before stated, and also as it appears that the claim was entered for patent at that time. Motion overruled, and defendants except.

JAMES MOREY recalled for plaintiffs:

I have taken some samples from the west end line of the Parleys Park, and had them assayed, and I have the return of the assays; Frank Foote made the assays; I took them last Sunday a week and had them assayed since I came to town; this is the certificate of assay; I have a piece of the rock here; I got it on the west end of the claim, and pretty nearly north of the Ontario boarding house; it was taken right off the croppings where there had been some digging and 150 feet more or less from the discovery; considerable of a hole was dug there.

The testimony of this witness was taken under defendants' objection that it was immaterial and irrelevant, and defendants now moved to strike it out on the same grounds. Motion overruled, and defendants except.

FRANK FOOTE, sworn for plaintiffs:

Witness is handed the certificate of assay identified by the witness Morey, says: I have seen this before; it is an assay of some iron ore that was left with me by Mr. Morey the other day; it is a correct assay of the sample.

Cross-examined:

The sample was a small piece of porous ore, perhaps two inches long by an inch.

Plaintiffs offer the certificate of assay in evidence. Objected to by defendants, as immaterial, irrelevant, and incompetent. Objection overruled; defendants except.

84 Certificate read in evidence, and marked Plaintiffs' Exhibit "B."

It is understood the stipulation in regard to the organization of the Parleys Park Mining Company, and also the stipulation in regard to Eastman's testimony shall be read in evidence at any time.

Plaintiffs rest.

FRANK EASTMAN:

Statement of this witness read in evidence for plaintiffs by stipulations as follows: At the request of Benjamin W. Morgan I pointed out to him the boundaries of the Parleys Park, Central, and Lady of the Lake mining claims, situated near Park City, Utah, on the 23d day of June, 1879, and at that time said Morgan established the site of a shaft to be sunk on said Lady of the Lake claim, and where the Park City Silver Mining Company have since been engaged in sinking a shaft, and declared at the same time that the shaft so to be sunk was intended for working said several claims.

It was also stipulated that the Parleys Park Mining Company was duly incorporated ———, 187–.

Plaintiffs' map Exhibit "C" was here put in evidence.

Plaintiffs rest.

JOSEPH H. BLACK, sworn for defendants, says:

I am 48 years of age; reside at Ashleys Fork, Wasatch county; occupation, farmer and stock-raiser; I was recorder of Uintah Mining District nearly six years—up to the second Monday in August, 1875; I remember the location of a claim called the Switzerland, and I was then recorder; I wrote the original notice
85 on the ground, went on the ground and examined the location previous to recording it. There were two notices. One was put up on the claim, the other was given to me to record in the books. The notices were alike. I saw one posted right where they had made their first location. It was south from the post of the Ontario, as near as I can remember—southerly from the survey post of the Ontario mine—the southeastern, I think. It was from the end of the Ontario—from the end line. The post I speak of was in the centre of the end line. The notice on the Switzerland was posted up and down on a stake. I don't remember how it was. Sometimes we put it on a stake and sometimes on a rock. I went all over the Switzerland ground to see if it conflicted with any other location. There were some prospect holes, but not to any extent. I found no stakes or monuments. The notice given to me I kept on file, and copied it into the books. The paper handed to me is in my handwriting. It is a copy of the notice as I recorded it, except that I don't know whether I appended that to the original notice on the claim or not, but it is a copy of the record in the book. I do not remember the date of the location, but it was sometime in October, I think 1874. After recording the notice the original was placed on file, not to be given to any person. As long as I was recorder the original was kept in my possession, locked up with all the mining papers—the original files. Wm. J. Montgomery succeeded me as recorder, and when I left the office the original was left in the office and turned over to him. My attention was after-

wards called to the original, as compared with the copy on the book by Mr. Montgomery. I cannot tell the time, but it was shortly after I turned the books over to him that he discovered an error in the record. I then examined to see if there was an error. I can-
86 not remember what the error was, but I corrected it for him; that was all—to make it correspond with the original file, it being an oversight in copying. I made the correction. I don't remember what it was now. It was not in regard to the course and direction. I think one portion of it was my name as recorder, if I remember right. I think my name was deficient as recorder. I don't remember exactly, but I think that is what it was. It was a very small matter. It was in order to make the two correspond —nothing that would change the location of the mine. I don't know that I could tell if I had a certified copy of the record what changes were made. The book handed me is Book "B" of the mining records of Uintah Mining District, Summit county. This is the book in which I recorded the notice, and it is recorded on page 129. It is in my handwriting, all of it. The two corrections in the latter part of the body of the notice are done in my handwriting, but I had forgotten what it was; the first being the erasure of "west," and "easterly" written over it, and the second being the erasure of "west," and "easterly" written over it. Those changes were made in the record shortly after I turned the books over to Mr. Montgomery. This is the correction I spoke of making when Mr. Montgomery was present, and I had neglected to put my name here as district recorder, and this was done at the same time. The notice as it now appears with the corrections is a copy of the original. I know it, because I copied this from the original, and he called my attention to these things for me to correct and make it correspond to the original; because I had never discovered the error until he pointed it out to me after the books had been put in his possession. At the time I made the correction he had the original in his possession, and I looked at it to see. I know it was the original he showed me, because it is in my handwriting. I don't remember
87 whether there was any certificate of recording on the original. I feel sure the paper from which I made the correction was the original notice. At the time the correction was made no other person, except Mr. Montgomery and myself, was in the office, and no person except Mr. Montgomery called my attention to the error. I had not then heard of any contest about the ground. The paper marked Exhibit "A" is a copy as originally recorded—it is a copy from the book as originally recorded. The book itself shows the corrections made by me by the interlineations.

Cross-examined:

I remember making this copy in 1874 while I was still recorder. I delivered it to Mr. Caine after the notice was recorded; I don't remember how long after. I presume I delivered it to Caine—it was to him or some of the locators. I endeavored to copy it cor-

rectly; I don't remember whether I compared it with the book—I generally aimed to do it and see if they corresponded, but sometimes in the hurry of course I neglected it. In the notice which is offered in evidence I have used the word granted for guaranteed in the recorded notice, and have inserted "mining" before "district," and the copy Exhibit "A" differs from the record in these particulars. I prepared the original notice of location and saw it posted. One copy was posted and another delivered to me to be recorded; I wrote both on the Switzerland ground, I presume with a pencil—I could not say, because notices are usually written with a pencil instead of a pen and ink. I don't remember whether I compared them to see if they were alike. I don't remember whether I compared the record with notices recorded after recording it. Two of the locators were present when the notices were prepared—Caine and Cammerman—I don't know where Hefferen was. I presume I wrote the signatures at the request of the locators. I had no
88 request from Hefferen—I had from the others. After recording the copy delivered for that purpose I filed the original, and it might have been shown but not out of my presence. I treated it as part of the records of my office for public inspection. I do not remember of ever showing it to anybody, and I do not remember of ever seeing it after I filed it until my attention was called to it by Mr. Montgomery. I presume I then read the original, but would not say positively I did—I have no memory about it. Montgomery called my attention to it, and he was recorder at the time. I had ceased to be recorder—and I made the alteration at his request. No one else was present then or at any time before it was made. I cannot tell what was done with the original notice when the correction was made; I have not seen it since. I don't remember how much time I spent on the ground when the location was made; I went the whole length of it; I examined the ground pretty thoroughly—I cannot say I saw every foot of it. I lived in the neighborhood of five miles from the claim, and started in the morning and went there; I don't remember whether I went on horseback or on foot, nor what time of the day I got back. I kept the records at my house and recorded the notice the same evening. I have been a practical miner. I have worked in mines off and on for probably two years. I think the copy of the notice I put on file was in pencil. I made a copy on the ground and may have taken that home and copied it and then given them one to put on the claim and on file. If that was the case, I don't think that I saw the notice posted.

Re-direct:

The last three lines of the notice as it stands corrected reads: "This location is situated 140 feet southeasterly of the southeasterly boundary line of the Ontario patent line stakes in Uintah Mining District."

89 Re-cross-examined:

The book which has been shown to me is the book in which mining notices were recorded in my office. It was the current record of location notices.

EXHIBIT "A."

Notice of the Swisserland Lode.

We, the undersigned, claim fifteen hundred (1,500) feet of this lead, lode, ledge, or deposit of mineral bearing rock or earth therein. We claim 140 feet northwesterly to the Ontario line, and we claim 1,360 feet southeasterly from this notice and monument, with 100 feet on each side of the vein for working purposes. We claim all the rights and privileges granted to us by the mining laws of the United States and the local laws of this mining district. This location is situated 140 feet southwest of the southwest boundary line of the Ontario patent line stakes in Uintah Mining District.

Located October the 3d, 1874.

JAMES CAIN, - - 800 feet.
MIKE HEFFERN, - 500 feet.
JOHN CAMMERMAN, 200 feet.

Filed for record October the 5th, 1874, at 4 o'clock p. m.

I have examined the above location and find a number of holes around it, but are abandoned, as the locators have failed to comply with the mining laws of the United States, otherwise it does not infringe on the rights of any previous location.

J. H. BLACK,
Recorder of Uintah Mining District.

90 By-laws of Uintah Mining District put in evidence by defendants, and marked Defendants' Exhibit 1.

Also the copy of the notice of location of the Switzerland, Exhibit "A" to Black's testimony, and a copy of the notice as it now stands on the record, the latter marked Defendants' Exhibit "2."

C. F. DALBER, sworn for defendants:

I reside in Park City, and first went there the latter part of May or first of June, 1872; I took up my residence on what has since been called Ontario Hill; I know where the Parleys Park and Switzerland mining claims are; we were all camped around the lake, and I was about 200 or 300 feet easterly from the Parleys Park; I resided there up to 1875; I left there about August, 1875; I lived there from about May, 1872, to about August, 1875, and had a cabin there about 150 feet from Caine's cabin; my business was prospecting and mining, and I have followed the business since 1860; I know of the Parleys Park claim in 1872, and I was at the discovery shaft several times that I know of in 1872; it was located about midsummer, and I was there shortly after it was located;

there was a trail close by and in going down town I passed there very often, and on some occasions, particularly after the first work was done, I went into the hole and saw what was there, and so on; the only way I can judge how deep it had been sunk up to July, 1873, is that I went in there and went out without any assistance; I am not very tall, and I don't know that I could get in very deep; there was no timber to assist me in getting in and out, just a dug-out, starting a shaft; I could not say that it was more than seven or eight feet, because I don't think I can climb any more to get in and out; In 1873 there was nothing done there at all; in 1874, about midsummer, I should think, work was resumed again; I think it was in July or somewhere there-
91 abouts. I know where the Switzerland was located, and shortly before I had seen the Parleys Park shaft. It was four or six weeks before, and merely by accidentally passing and seeing nobody at work. I did not pay any further attention to it. I was passing it frequently—had to pass there every time I went to the Ontario, and I had to go there very often. The last I saw of the shaft that summer, it was about 15 feet deep. I judged that by the timbers. I saw the Parleys Park shaft that fall after the Switzerland was located, and there was no more work done on it. I believe the next work on it was in 1875. After the location of the Switzerland in 1874, and up to the spring of 1875, the Parleys Park shaft was the same depth—about 15 feet. There was two or three sets of timbers in it; I think it was three, and then there was a little space where there was no lagging at the bottom—that was very short. In 1872-3-4, and up to the time I left in August, 1875, I had done work prospecting, and had several holes dug, and was familiar with the value of mining labor in the camp at that time, and with the worth of labor in that ground. In the fall of 1874 that shaft was 15 feet deep, timbered with three sets of timbers and two lengths of lagging—was worth, I should think, from three to four dollars a foot—I would call that a good price for it—more than good wages would be. In 1874 I was prospecting for the very ground, and I had it located even 30 days before it was located by Jim Caine. It was not known it was the Switzerland. That was 30 days before the Switzerland was located. It was the 2d of September. I have got the notice yet. Before making the location I examined the Parleys Park shaft and the ground all about there with reference to making a location. The Switzerland was located in October, 1874, and it was on the ground when the recorder was there, and was there before, of course. I think the recorder was on the
92 ground a very few days after it was located. I don't know whether it was the fourth or fifth, but something of that kind. There were there Cammerman, Black, and myself, and there were two or three more outsiders I did not know. I remember Cammerman particularly, because he was interested, and I tried to get an interest, and besides that he was a German and I could talk the language with him. Black was the district recorder; I had been ac-

quainted with him some time. We met first at my cabin. He came first to my cabin before he went over there. I think it was shortly after noon. I believe we had some coffee and a little lunch before we went up there. We all met near the discovery point. Black was writing a notice on the ground—two notices. Put one—I don't know whether I or he did it—on the stake, and one kept for record, and both were filed. The one that was put on the stake was filed just the same as the other, so that it would notify anybody who came that it was recorded. It was done very frequently. He always when he recorded a claim on the ground—it was always recorded on the notices on the ground. I either put up the notice that was posted or saw it done. Jim Caine may have been there, but I am not positive. The notice was put on the stake—a piece of lagging, I think. It was a pretty large stake. It was driven in the ground, but not deep enough to stand, and I believe there was a little dirt or a few stones laid around to keep up the stake. I do not know where the notice which was put on the stake now is. I saw it on the stake afterwards. I don't think I read the notice afterwards, because I know in the first place what was on there, and I don't think I read it again. I read it before it was put up. I think Cammerman was there all the time I was. As Black was writing the notice I was right by him, and he stopped as he came to the course of it, and he says to Cammer-
93 merman and myself—I was expecting to get an interest in it: "what course do you want me to put down here," so we tried to guess, looked to the sun, and as near as we could judge by the sun, we came to the conclusion to make it northeasterly and southwesterly. They had it claimed 140 westerly and 1,360 easterly from the discovery. That was the way it was put in the notice, because I thought it was a little short on one end, on the Ontario side. I thought they would lose some ground. That is the way I remember it. The 140 feet northwesterly extended to the Ontario, because it was claimed adjoining the Ontario—to the east end of the Ontario. From where we stood at the discovery, I could see it was close to the mineral monument—on the east side of the mineral monument. Mr. Black took one of the notices with him and the other was posted on the claim, and we both compared them, That is the reason I know what was written. At that time there was a small hole at the discovery of the Switzerland—no other work had been done by the locators. The shaft was started. The first work is now to-day the crop of the Switzerland shaft. At the east end of the Switzerland, I and Cammerman staked it out ourselves. We staked it out with a tape line. I don't know whether it was before or afterward, or it may have been the same day before the recorder came, but it was close to that time. I don't know whether any stakes were set on the westerly end or not. We thought it was a matter of course adjoining the Ontario stakes, and therefore there might not be any at all, at least I did not know it. The survey stakes of the Ontario were then standing, and I think

the owners saw them—I saw them. The monuments at the east end were blazed trees. At the northeast corner the monument was a small tree about four or five inches thick. I blazed it with an adze or hatchet that I had. I wrote on it, I believe with a lead pencil, "the northeast corner of the Switzerland." That is
94 about all I think. At the southeast corner I did the same there—put that on a tree. I did not measure the distance between these end stakes, but guessed it, because there was brush and trees. The northerly tree, I think was a cottonwood, and the other a pine tree. The tree at the southeast corner was blazed the same as the other, and southeast corner Switzerland written on it. The trees were in a southeasterly direction from the discovery point, as near as I can remember. We tried to follow up the line of the Ontario. The lines were run by the eye, intending to get a continuation in line with the Ontario discovery. I have never been to the stakes of the present official survey of the Switzerland, and do not know whether they conform to the location. I think the pine tree at the southeast corner may have been a foot or more in diameter. The owners were working on the claim that fall. I went to Salt Lake, and the next spring when I came out considerable work was done there. Inside the year after the location, I saw a shaft about 30 feet down, I believe, and a tunnel that I think was over 50 or 75 feet. The shaft was worth $3 or $4 a foot, and the tunnel was worth a little more on account of having a little harder blasting ground.

Cross-examined:

There was no work done in the summer of 1873, in the Parleys Park shaft—not to my knowledge. I think I saw it in 1873 up until the snow fell, because I generally left the camp when the snow came. That would be about October or November, I should judge. I think the work in 1874 was done somewhere in July. I don't think I know who did it. I saw persons at work there—it might have been a month or so before the location of the Switzerland. I was passing off and on, and so I don't know. It may have been a month, and it may have been two weeks, but it was somewhere about there, I noticed it.

95 OBED A. PALMER, sworn for defendants:

A map was produced by the witness and marked Exhibit "3."

I am a mining engineer; I made Exhibit 3; it purports to show a portion of the Ontario mining claim, a portion of the Lady of the Lake mining claim, all of the Parleys Park mining claim, all of the Switzerland mining claim, and also all of the Accidental mining claim; the Ontario, Lady of the Lake, Parleys Park and Switzerland claims are laid from the returns of the patent surveys, and are correctly laid, individually and with reference to each other; the underground works are laid from surveys made by myself; the Accidental claim is platted from the notice of location; everything

represented on the map is correctly laid down from the data I have; the porphyry dyke laid down is platted from my own surveys; it is developed and shown in the Como Tunnel, in the west drift from the Como Tunnel, on the surface near the Brockie cut which is the northeast corner of the Ontario mining claim, and also in Tunnel A.

Exhibit 3 put in evidence.

FRANK MCLAUGHLIN sworn for defendants:

I have resided in Park City nearly six years, and have been a miner the last 25 years; I know the Parleys Park claim, and I saw the discovery shaft in the fall of 1874, about October, about the time the Switzerland was discovered; there were but three sets of timbers in and two lengths of lagging—it would be 14 or 15 or 16 feet deep; I am familiar with the cost of work in that district, and have done a good deal of contract work; sunk shafts, run tunnels and drifts over there; I know the character of the ground in which the shaft is sunk; I can do it to the depth of 15 feet with the timbers I saw in it for four dollars a foot; of course it is worth more if you sink it deeper; I have drove harder ground for the same price; there were no standing trees near there in 1874.

96 DOMINICK DIGNAN sworn for defendants:

I live in Park City, and have been there off and on since 1871; I am district recorder now; I was in the camp during 1872, and know the Parleys Park mining claim; I saw the discovery shaft about the 20th or 23d of August, 1872; there was a shaft there four by five, may be four by four one-half feet, and about eight feet deep, with one set of timbers to hold the windlass frame, the uprights of the windlass on top; there was a notice posted on a stake; I don't think there was a tree within 50 feet of it, or any kind of a small limb either; I was at the shaft about the 29th or 30th of September, 1874, or the 1st to the 3d of October, and observed it at that time; the shaft was then about 15 feet deep; there were three sets of timber and two lengths of lagging and two or three feet under the last set; I have done some contracting there, and let a good deal of contracting there, too; I sunk the Ontario old shaft 300 feet—a two compartment shaft and timbered; the price for the first 100 feet was $13, hoisting about 400 or 500 gallons of water an hour out of it, and the 3d and 4th hundred feet was $14; hoisting the water, timbering and everything; in 1874 the Parleys Park shaft sunk to the depth of 15 feet, and timbered as I saw it, might be worth five dollars per foot; the wages were higher then than now, and it might be worth $5 per foot, but could not exceed that; I have let contracts this year for $3.50 and $4 and $4.50 per foot in as hard ground as that was.

Cross-examined:

I include the lagging and timbering and sinking altogether; the

timbering might be worth 40 or 50 cents a foot; the timbers were convenient those days; as convenient there as at the Ontario; they had to be hauled down the hill, which is easier than hauling up; there was no road, but a man can take a yoke of oxen and haul it down there anywhere.

97 That would be about $2 a set of timbers. One man could put all I saw in there in less than a day—well, two men could in less than a day. I know I have done more than that in a day myself. I have been at the shaft several times since 1872. It is larger now than it was then. It was then about 4 by 5—it may now be 6 by 7 or 5 by 7, or somewhere along there, because it has caved down a great deal. Such matter as that is bound to cave in left standing four, five, or six years. I don't think it has ever been made larger by work. If is now 6 by 8—it has been enlarged since I saw it in 1872. In 1874 they timbered it up, and they made it a little larger than it was in 1872. In 1872 there were no timbers in it. I think in 1874 there was very little contract work there, only the Ontario shaft, which was $13 per foot. A two compartment shaft. Everything was furnished. They did the hoisting. It was down a hundred feet when I took it and in hard porphyry. The Parleys Park shaft is sunk in quartzite, which is calculated to be a good deal softer than porphyry. Some quartzites are pretty hard, but that was easier than the porphyry there, as I can tell by looking at the rock on the dump. I examined it several times.

JAMES MCBRIDE sworn for defendants:

I have lived in Park City over three years, off and on, and my business is working in mines and prospecting, doing a little contract work, &c. I have followed the business of mining eight years. I know the Parleys Park claim, and recently examined it. I have seen it for the last three years, passed by it for seven months twice a day when I went there in 1877, and noticed it off and on a great deal. I have taken contracts to run ground the last year in Parleys Park. I am acquainted with the nature of the ground in the neighborhood of the Parleys Park shaft, and I have recently examined that shaft.

98 Q. What, in your judgment, was it worth to sink that shaft, say 15 feet, putting in three sets of timbers and two lengths of lagging, per foot?

Objected to, as he shows he did not reside there, and shows no acquaintance with the prices at the time this work was done.

Objection sustained, and defendants except.

Q. How much could that shaft be sunk for per foot to the depth of 15 feet?

Same objection, ruling, and exception.

A. A miner could sink that shaft, I should think over two feet a

day, for seven or eight feet, because I could throw it out myself without any assistance; below the point where it could be thrown out with a shovel he could sink the same, but it would take a person to hoist it from him. It would require an additional man. To do the work and timbering 15 feet deep, putting in three sets of timbers and two lengths of lagging, the timber being found on the ground, two men could not be over seven days.

PETER KALLER sworn for defendants:

I have been living in Parleys Park, off and on, since 1872. I first got there about the last of July, 1872. I have been a miner since 1865. I knew the Parleys Park since the first days I went there, because I took up a claim close by, prospecting on the same hill. I observed work done at the discovery point of the Parleys Park in 1872. They were working on it when I came in—when I first saw it. Mr. Harrington was working there. It was then down four or five feet. They worked a little longer than that. When they left it that year it was from eight to ten feet deep. There were no timbers in it. In 1873 I stopped the bigger portion of the winter there at what they called the Lake House, and was working on my own claim. The Lake House was 500 or 600 feet from the Parleys

99 Park shaft, and I saw the shaft when I left there in the spring of 1873; I went back about a week or ten days before Christmas in 1874 to work on my claim. I saw the Parleys Park shaft at that time. There was no snow on that hill then. I heard about the Switzerland and visited it—the Switzerland had water, and I don't know how deep it was. I also visited the Parleys Park shaft; they done little work on it in 1874; there were three sets of timbers in it and two lengths of lagging. With timber and all it was about 10 or 15 feet deep; they did not have a chance to put another set in. I was familiar with the cost of the work in that camp then. That shaft timbering and all, in those days, could be done to the depth of 15 feet at $4 per foot and make good wages; to-day it could be done for $3. I made a location at the west end of the Parleys Park adjoining it. In 1872, and up to 1873, there were no stakes on the Parleys Park; we were all careless; there were monuments with notices on them, and that was about all—could not tell which way the claim does run. In 1875 there was work done on it; I don't know how deep it was; it went on an incline below and I could not see the bottom; this was at the discovery shaft. When I went back in 1874 I went to live with Mr. Reed, where Park City now is.

Cross-examined:

After 1872, I saw the shaft when I left in the spring of 1873; I saw the shaft in the winter, traveling by, but no work was done on it. I located my ground in the summer of 1872. I never saw a stake—none of us put up stakes. There was no line about the Par-

leys Park, except the discovery stake, because there was no stakes. None of us put up stakes, I did not, and I was around the hill, because if one put them up the other one would assist another. The Ontario was staked; when Chambers bought it he made a
100 survey and put his stakes up. I made my east line in 1874. I think the work could be done in 1872 and 1874 at $4 per foot, timbering and all. Timbers were very handy around that country. I know of lots of tunnels being run and shafts for that price. I let out a shaft for 72 feet at $2.50 per foot, on the Waterwitch above the Empire. The Ontario hill is still easier work, provided you get a crevice to go on, it is not very hard. In the Parleys Park shaft it is quartzite—mine is porphyry and quartzite. I call the quartzite easy rock to work—it is shelly and you don't need to blast it. For a distance of 15 feet two men, one below and one on the windlass, could go down three or four feet per day. I have been sitting by this shaft a good many times when they were working there and noticed how much was rock and how much earth. I would like to take contracts for such work at $4 per foot.

JOHN KEATILEY, sworn for defendants:

I live in Salt Lake City, and my business is livery stable keeper. In 1874 I was in Parleys Park, mining; I have been engaged in mining, or interested in it, 18 years. I was prospecting in Parleys Park and knew the Parleys Park claim, and I saw the discovery shaft for the first time in 1873, in June; I saw it very little in 1873, after that; I saw it quite frequently in 1874, and some in 1875. In 1874 I saw it about the first day of July, and saw it until Christmas of that year frequently. When I saw it first in July I should judge it was about eight feet deep. There was no timber in it at that time. Shortly after Mr. Langford and some others were working on the shaft. I cannot remember the dates. After they quit work I went to see the shaft one day as I was going down to Park City, and I judge it was about 15 or 17 feet deep, as near as I could guess. It was not to exceed 20 nor less than 15. There were three sets of timber in it and two lengths of lagging. I had a claim
101 bonded from Mr. Dolberg, and was working just over the ridge from the shaft about 200 feet distant. I was sinking a shaft. I and McHenry did some work in a cut back of Caine's cabin hunting for the extension of the Ontario; that was in August. I was familiar with the price of labor and the cost of mining work in that neighborhood at that time. I would have been willing to contract to sink and timber that shaft as I saw it for $4 per foot, and thought I was making good wages. I am familiar with the character of the ground.

Cross-examined:

When I first saw the shaft in 1874 there was no windlass on it, nor any sign there had been one. The hole seemed to be sunk about as deep as a person could go in and throw it out, and the

banks had slacked and caved in. The work in 1874, as near as I can remember, was done about July. I am satisfied the Langford party put in the timbers and did the work there. I passed the shaft in the summer of 1873, but took no particular notice of it. There was no change in the hole when I saw it first in 1874. From the summer or fall of 1872 until 1874 no work was done. I am satisfied of it; I am certain.

TIM SULLIVAN sworn for defendants:

I live in Park City, and have followed mining about fifteen years. I have been in that camp about five weeks. Went there from Stockton. I have been in Utah since July, 1859. I am one of the discoverers of the Davenport, in Cottonwood. I never saw the Parleys Park until the day before yesterday. I examined the discovery shaft. We just went to the surface; did not go down into it at all. We examined the first 15 or 20 feet of it as far as we could see down, and made an examination of the ground and character of the rock. In that rock a man ought to sink two feet per day, any way. There is a vein there that is probably a
102 foot wide, or a little more; that is soft material. Then the rest of it is a shaly quartzite—a kind of loose formation, not very hard to work. After ten feet deep the windlassing would make some difference. Two men could afford to sink it two feet a day to the depth of 15 feet anyway.

Q. What was it worth to put in two sets of timbers and two lengths of lagging from the top?

Objected to by plaintiffs on the ground the witness was not there, and is not shown to know anything about wages at the time in question.

Objection sustained and defendants excepted.

GEORGE BLACKBURN sworn for defendants:

I have lived in Park City three years and three months, and my business is mining and prospecting. I have worked on a good many contracts, but never taken any myself. I know the Parleys Park mining claim, and am familiar with that section of the camp. I have examined the discovery shaft; I know the tunnel running from an open cut, connecting with the bottom of the shaft; I worked in the tunnel; I commenced the 22d day of July, 1878, and worked a few days in the place of another man who was sick. Starting from the surface at Parleys Park shaft, two men ought to make about four feet a day for the first 15 feet, by relieving each other, if they were miners, and any kind of workers at all. To get out three sets of timbers to be cut on the ground would take about one day, and would not take two men over half a day to put them in.

ANDREW JACKSON sworn for defendants:

My business is mining and prospecting, and I have lived in Park

City, on and off, since 1875. I have followed that business, on and off, for 16 years. I first saw the discovery shaft of the Parleys Park claim in 1875, in May. I set on the dump and looked down; this was about the middle of May, 1875. It may then have
103 been 12 to 14 feet deep. I could not remember distinctly, but I think there were three sets of timbers in it. I should judge the shaft was 4½ by 5, or so. The first time I went to the shaft there was a man by the name of Forbridge, or Borbridge, and one by the name of O'Donnell working there. I think Harrington was about there. I was looking for work. I am positive this was in May, 1875.

Cross-examined:

I could not say whether they were just beginning work or not. They were working in the shaft. I noticed the depth down the hole—did not pay any particular attention. I could not say it was deeper than 12 or 14 feet. I should judge it was about that. That is my memory. There was a windlass on top of the shaft, and it was timbered from the top. If there was any untimbered space, it was not a great deal. There may have been a little untimbered space at the bottom—there generally is. I do not know how long those parties worked there that spring.

It is stipulated and admitted as a fact by plaintiff's counsel that work was done on the Switzerland according to law up to October, 1876.

JOHN CREAM, sworn for defendants:

I have lived in Park City since about the 16th of April, 1872. I have followed mining, off and on, on this coast, 22 years. I know the Parleys Park claim—the first time I noticed it was in the fall, about October, 1872—I was then at the discovery shaft of the claim. It was then between seven and eight feet deep, as near as I can judge, and no timbers in it, and no windlass—nothing but a hole. I did not observe any work done on it until 1874. I saw it in September, to the best of my knowledge, and more work had been done on it. I do not know when it was done. At that time in September it was about 15 or 16 feet deep, to the best of my
104 opinion. I did not measure it. There were three sets of timbers in it and two sets of lagging. I was at that time familiar with mining work and its value in that camp. It would be worth $4 or $4.50 per foot to sink that shaft 15 feet with three sets of timbers and two lengths of lagging.

Cross-examined:

I was in the habit of letting contracts by the foot. I did not let any contracts at that price. I have taken contracts all over that camp in a great many places. I did not take any on that hill. I do not know of any let on that hill at that price—there is very little work done on that hill except the Como Tunnel. The size of the

shaft was 4½ or 5 feet, or somewhere along there. That shaft is caved a little, 4 or 5 feet down. It is sunk in what I call a quartzite formation, not very solid—it is blocked quartzite, not very hard to work. Sometimes quartzite is hard to work. I had a contract on the Flagstaff shaft, 300 feet deep. The Flagstaff is on the summit about a mile from the Ontario. The formation is quartzite there, of the same character as this. The Flagstaff was a good deal harder when we got down the last hundred feet. Our contract was $12.50 per foot. We timbered it, sunk a two compartment shaft, four by eight, three inch plank for cribbing. The timber was furnished and we furnished all the balance, all but the cribbing. I do not know of any contract on Ontario hill for $4 per foot, in 1872 or 1874. In 1878 Frank McLaughlin and I run a tunnel on the Washington through pretty hard rock for $4 a foot.

WILLIAM IRETON, sworn for defendants:

I have been a miner since 1868, and in Utah since 1872. I am now foreman of the Oregon, in Cottonwood. I visited the Parleys Park discovery shaft the day before yesterday. The timbers which had been taken out and were lying on the dump were small timbers, about 4 by 4 inches—would not square that; it was about 4½ by 5½; a small prospecting shaft. I did not go down more than about 20 feet, because it was caved in; some of the timbers had fallen through and made it bad to get in; I could not see the bottom of it; I did not go into any work connecting with it; I examined the ground in which the shaft is sunk; it is a regular gravel on top for four or five feet. There is some boulders and rough rock until you get down 10 or 12 feet, then you come into loose rock. It is not a good solid formation until you get down about 15 feet. There is nothing there to speak of that I would call rock. I have directed mining work as foreman and superintendent a little over four years, and have a kind of an idea how much a miner can do in ground. Two miners will sink that shaft three feet a day to the depth of 15 feet, and not work very hard either. With the timbers I saw it would not cost $7 for three sets and two lengths of lagging. There was no vein in the shaft that I could call a vein. There was a little crevice right on one end of the shaft on top, and it was filled with the same material as the rock surrounding it. The crevice was not such an indication as a miner in the exercise of good judgment would follow unless there was great excitement and he wanted to make a stake out of it. I think I would abandon the place after three or four days' work.

Cross-examined:

I am not very familiar with that camp; I have seen some of the miners there. I never visited any of the discoveries except the Bonanza and some others two or three miles off. I have been at the Ontario discovery, and it shows a good deal better than this, and at the old point where they stripped off they showed the ledge

10, 15, or 20 feet wide and sunk on it. The Ontario at the surface is a foot or sixteen inches wide. In this, right on top at the
106 east side, it is a foot; down further it is about six inches; down 12 feet it seemed to be narrowing up, and some of these boulders of rock came in. The crevice is continuous down as far as you can see. I call it a crack right in that formation. There is no rock there to form a vein in the first place—not for that distance. It is a soft formation. In a country where the debris is as deep as it is on those hills, I should not wonder if you sunk down 20 or 30 feet to get a solid formation. You do find crevices in loose wash formation; you don't know how long they may last—maybe five feet, maybe fifteen; I have followed plenty of them in the Cottonwoods on Scott hill; I don't mean a regular crevice; the rock is broken up where you first strike it until you get to the formation; it is an opening in the loose rock; there has been a separation there which is continuous for 12 or 14 feet; I did not see the end of it; I don't pretend to say it ends there. If that continues down 50 feet as I saw it on top, I would not say it was a mere crevice, but call it a mine; but on the appearance at the top I would not follow it 50 feet. If I followed it 50 feet and it continued, I would look for solid rock to come in to get the ledge if there should be one; I don't regard the walls of that crevice as in place; I did not see any rock in place on the surface on that hillside; I presume the rock is in place by going down for it; there is not what I should call rock in place in that shaft; if it is, it is terribly loose looking ground for solid rock. This seam has an inclination to the north, with the general course of the country formation there. If that seam opened out as I got down, and I got any trace of ore in it I would follow it as a vein. There is no ore there that I saw; if there was ore that assayed all the way down, it would be a little more encouragement to follow. I have known plenty of miners to follow just as poor indications, and I have known a good
107 many better indications which did not turn out mines.

W. A. PRATT, sworn for defendants:

I live in Salt Lake City, and have followed mining about eighteen years, and nine in Utah, in various districts, as foreman in charge of mines, prospecting and working by the day; I examined the Parleys Park shaft on Tuesday of this week; I should think it was about 20 or 25 feet down to the old timbers where it has been throwed in; I should judge it was about 4 by 6 feet in size; I could not tell the depth; I could not see any further than where it had caved, perhaps 20 or 25 feet; the formation is quartzite, kind of broken up, brecciated; there was a streak there I should think about six inches, probably eight inches, and a kind of iron stained quartz; I did not examine it closely; I examined the rock in which it is sunk with reference to its hardness; to the depth of 15 feet I think two men could make three feet a day in sinking; may not run over two and one-half some days; I think the average would

be about two feet; I observed some timbers thrown out on the dump; they were not timber, small pieces; I guess it was something that had been used for lagging, three or four inches I think; the average would not run over six, what I saw; two men ought to cut the trees and frame and put in three sets of timbers and two lengths of lagging in a day or a day and a half; I observed a crevice in the shaft; I did not pick into it or anything of that kind; I only examined it right at the shaft; could not tell how far it went either way; I think I could locate it as a vein.

W. I. SNYDER, sworn for defendants:

I have lived in Park City continuously since 1873, and I went there in November, 1871, and was there from time to time
108 until May, 1873; In 1872 I was familiar to a moderate extent with the mining claims and surface of the country there; I first saw the Parleys Park claim in the fore part of August, 1872; I went to what was called McHenry City, where the lake was, and came down and saw Harrington at the discovery of the Parleys Park; I can fix the time within ten days; it was somewhere in the fore part of August, 1872; they were working in the shaft, and they were down about eight or nine feet, I should judge, not deeper than that; there was no windlass on the shaft; they were throwing it out with the shovel; I saw it next in August, 1873; there was no difference from what I saw it in 1872; I saw it also during the greater part of the fall of 1873, I was up and down the trail near it; I was carrying meat up to Mr. Clancy and to Mr. John Tye, above the McHenry; there was no change in the shaft during the fall of 1873; the first time I observed any change in the work was in July or August, 1874; I would not be certain as to the month; I cannot tell more definitely about the date; the shaft had been sunk to a greater depth of five or six feet, making it in all probably 14 or 15 feet deep; there were either two or three sets of timbers and one or two sets of lagging, I would not be certain as to the quantity of them and the windlass on top; there was no one there working on the shaft; two years afterwards was the first mining prospecting that I did in the camp; I know the character of the ground in which that shaft is sunk; I took it to be broken up quartzite drift; it is soft, easy to work, because seams are frequent and it is rather of a shelly character generally; I saw the shaft again during the month of June, 1875; in June, 1875, Mr. Langford and some one, I don't know who else, began work there; I don't know when he commenced, he had been working before I saw him, I don't know how long.

109 Cross-examined:

In the fall of 1874 the shaft was about 14 or 15 feet deep, and Langford went to work there the following spring or summer: there was no work done in the fall of 1874; I don't know how deep it was when Langford quit.

MARTIN CORRELL sworn for defendants:

I live at the Ontario mine; I have looked after timbering, and have seen that work was done on the Switzerland mine; during the year commencing October 3, 1876, and ending October 3, 1877, there was considerable work done in that ground running the main tunnel; it was done on the vein in the tunnel running from the Como Tunnel; I cannot state definitely how many feet were run that year, 20 or 40; I cannot state exactly at what cost—it is a well timbered drift and large; I think it is, inside of the timbers 3 by 4½ feet; the timbers average about ten inches, I think—some larger, good timbers, a regular tunnel; it was run for work on the Switzerland vein; I had charge of the work that year, and Mr. Kervin would sometimes be there; during the year commencing October 3, 1877, the Switzerland incline was timbered from top to bottom, under my directions, and a portion of the tunnel I have first described was run the same year; the retimbering of the shaft I think cost over $100, and it was worth that; I think 20 feet or more was run under ground that year in the same drift we worked in the year before. The work in the drift was timbered; the timbering and work of running the drift must have cost $7 or $8 per foot; in the year commencing October 3, 1878, the tunnel was run ahead 22 or 23 feet and timbered and lagged well; the waste in running the last part of that had to be run out 400 or 500 feet to the dump. From October 3, 1876, to October 3, 1877, I think about 30 feet were run, it may have been more; I think that work
110 worth $6 or $7 per foot; this drift was run to develope the Switzerland claim; there was more work done in 1876 or 1877; there was a shaft sunk from the Switzerland Tunnel to this work I have just described, 30 feet; it was between 1876 and the close of 1877, and was worth about $6 a foot; I have often seen the Parleys Park discovery shaft; the first time I saw it was September 19, 1872; there was a small shaft down about eight feet and not timbered; I saw it often that fall and every year since; I saw it in the summer and fall of 1874; in the fall of 1874 it was 14 or 15 feet deep; I believe it was sunk deeper the next spring, 1875, and not until then; when I saw it in the fall of 1874, I believe there were three sets of timbers in it and two sets of lagging; I think the clear shaft inside of the timbers was about 4½ by 5 feet.

Cross-examined:

I first saw the Parleys Park shaft September 19, 1872; that day I went to the Ontario mine; on the evening of that day I went to board at the Reich House at the lake, and this shaft was the first hole from the trail above the Ontario; then I think it was about eight feet deep; it was irregular in size, large enough to work nicely in, 4 to 5 feet in diameter; I arrived in camp that day, and have lived at the Ontario ever since; I boarded about a week at the Lake House; Mr. Langford and Mr. Harrington came out

there, and there was no change in the shaft until then; this was in the latter part of June, or in July, 1874; they began to work the latter part of June or fore part of July; I don't know who worked with Langford—I think there was more than one; I think there was a night shaft on for a few shifts; I know James Morey; he may have worked there, but not to my knowledge; I often saw the shaft after they did the work there, and it was 14 or 15 feet deep; I have not looked into it with a view to determine its
111 depth positively. I was up often, and when I was not in a hurry used it as a resting place; I do not know who put up the windlass; it was put up the latter part of June or 1st of July, 1874; I never saw any windlass there until then; the parties were there at work in 1874 several days, probably a week; miners' wages in the camp were then $4 per day and they board themselves; this drift from the Como Tunnel eastward is about 115 or 120 feet; I think about 45 feet of it was run since October, 1877; I think the shaft that run down from the Switzerland was connected with this drift in 1877; that would count on the year 1876 and 1877—that is between October and October; I was in the employ of the Ontario Company, and the company paid me for my time; I was foreman of the surface and attended to lots of outside prospects in various places; the men were employees of the Ontario Company; I think they took vouchers for all their time from the Ontario Company; the last 22 or 23 feet was done by Cassady and Pound; they were in the employ of the company at various times and were when we took them to do that work; Mr. Chambers paid them; I don't know whether they were paid by the company—they were paid there at the office; Mr. Chambers directed me to take them and do the work—development; Mr. Chambers is superintendent of the Ontario Company in charge of the work; all this work was underground except this here—the opening of the shaft; I re-timbered this hole; some of the old timbers were taken out that were rotten and better timbers put in and the shaft made square; the cost of cleaning out and re timbering was more than $100; since and previous to 1878 we have been in possession of these works; we have a key at the Ontario, and no one has entered or done any work to my knowledge without our permission; in 1879 I have not
112 known anybody to be there but us and those whom we took there; I don't know anything about the Accidental shaft; a man named Cassady worked there; it is the same Cassady who worked in the works I have referred to; at the time he worked there we had exclusive control of these works and claimed the ground, and the key was in my possession at the office.

Re-direct:

The rock in the underground works of the Switzerland is some of it harder and some softer than the rock in the Parleys Park shaft, and all deeper.

OBED A. PALMER, recalled for plaintiffs:

The scale of the map (Exhibit 3) is 50 feet to the inch; the distance from the Parleys Park discovery shaft to the main shaft of the Lady of the Lake is a little over 1,100 feet, and these two claims do not adjoin at any point. The main shaft of the Lady of the Lake is in Blue Ledge Mining District. I am acquainted with the Como Tunnel and its works; the tunnel is about 380 feet long; it cuts the vein at about 250 feet from its mouth; there is then a drift upon the vein easterly a distance of about 190 feet; the drift is also continued westerly from the Como Tunnel a distance of 80 feet on the vein, from which point the drift is continued off the vein and nearly at right angles to it, cross-cutting the hanging country for a distance of about 70 feet. None of the surface over the west drift, but about 130 feet of the surface over the east drift is claimed by the Switzerland. There is a winze sunk on the vein from the level of the Switzerland Tunnel down to the Como Tunnel, a distance of about 93 feet and intersects the Como Tunnel at a distance of about 65 feet easterly from the intersection of the Como Tunnel and the vein; that winze is within the Switzerland claim; there is also the Switzerland Tunnel run with the vein and then a drift easterly upon the vein connecting with the Switzerland shaft
113 from the surface; the tunnel is about 160 feet long to the intersection of the vein, and the drift from there easterly to the bottom of the shaft is 105 feet, then up the shaft to the surface is 82 feet; the vein I speak of is the vein disclosed in the Switzerland works; I have examined the Parleys Park discovery shaft; there is a tunnel running to the bottom of that shaft, marked tunnel "A" on the map; there is south of the mouth of the tunnel before it enters cover, an open cut of fifty feet long, after the tunnel enters cover it is about 96 feet; the depth of the Parleys Park discovery shaft down to that tunnel is 39 feet; it has never been sunk any deeper, its total depth is 39 feet; I have been through the shaft and examined it; when I started to examine it last, the timbers had all caved in from the surface; I had two men remove all the loose timbers and clean it out so I could pass through it; that was about ten days ago; the tunnel is running through quartzite and the open cut is in quartzite; there is a vein in the cut; the portion of it containing ore is about four or 5 inches wide; then upon the hanging side of the vein is the porphyry, a narrow seam of porphyry which is found running continuously with the vein through the Como level, the Switzerland level, and seen through the various shafts and winzes on the vein, that is on the north or hanging side of the vein; the point on the map where the vein appears in the cut is marked "A;" from that point through the cut and tunnel to the bottom of the Parleys Park shaft is about 130 feet; I first became acquainted with that locality late in the winter or early in the spring of 1874; I have been there several times each year since then; I have since then been familiar with the rock and vein formations of that hill;

the work from the point marked vein in the open cut, through to the bottom of the Parleys Park shaft is all in quartzite, except a dyke
23 feet wide; from the vein it is about 100 feet in quartzite
114 to the dyke, then 23 feet through the dyke, then nine feet more from the hanging wall of the dyke to the bottom of the centre of the Parleys Park discovery shaft, which is sunk in quartzite, more solid at the bottom than top; at the top and for some distance down, probably 20 feet at least, for the entire width of the shaft the quartzite is much broken up; it is fractured, fissured, and shelly for some distance back of the shaft into the hanging country as shown by the appearance of the quartzite as it crops still north of the shaft; the timbers which had fallen in and which I had removed to get through it, were about five inches square, and I think about 3½ by 4½ feet as nearly as I could estimate; those taken out were piled on the dump at the south side of the shaft; there was one set of timbers left in the shaft; there was one set of timbers left in the shaft about 20 feet down as near as I could judge; I last saw the shaft in that condition about ten days ago; the next morning after I had it cleaned out, Mr. Colbath, Mr. James, Mr. Matthews, Mr. Daggett, and Mr. McQueen were at the shaft examining it, and they examined it with me; the shaft was clear at that time; there is no vein in it; the quartzite through which it is sunk is very much fractured, fissured, broken up, and very shelly, easily worked out and difficult to keep from caving unless it is timbered, that is for a distance of 20 feet or such a matter; in one place there is at the top a width of about eight inches that runs down to about four inches in the bottom which is composed of quartzite, the same as the rock on either side of it, that is a broken, brecciated, cracked quartzite from the walls or from the sides, from the solid rock, differing in no respect from the quartzite extending north and south of it, except in its condition of being broken, crashed, brecciated for some distance, but not as fine—larger and coarser blocks; that crashing and breaking
can be seen for some distance away from the shaft; I think
115 there is nothing in that shaft, or any part of it, which would constitute the discovery of a mineral lode or vein. The shaft of the Switzerland is sunk upon a vein, with quartzite foot and hanging walls with a very narrow belt of porphyry, probably 3 or 4 feet wide, lying upon the north or hanging side of the ore and against the hanging wall of the vein, and that accompanies the vein uniformly throughout the extent to which it has been developed at that point. I did not take any samples from the Parleys Park discovery shaft, but saw samples taken by others. There was nothing by which you could determine the direction of the seam in it, other than the distance of four or five feet at the top. The course of the 23 feet of porphyry or dyke, I have mentioned, is determined by the position in which it is found in the Como Tunnel, extended northerly beyond the vein, and also in the drift from the tunnel westerly, or rather in the continuation of the drift westerly, from the Como Tunnel. The Como Tunnel extended north of the vein,

passes through the dyke, showing the foot and hanging wall of the dyke, and enters into the quartzite beyond it. Then in coming west on the vein from the Como Tunnel, leaving the vein and cross-cutting north, we can arrive at the same dyke and have cut into the porphyry about six feet and stopped, not having reached the hanging wall of the dyke, but with the foot wall exposed at that point, and again exposed in the Como Tunnel north of the vein. We assume that to be the strike, and as the strike of the vein for that distance. That strike is about northeasterly. The hanging wall of the dyke is cut in the Como Tunnel north of the vein, but is not cut in the drift on the west side of the tunnel, but is drawn there, simply assuming it to be about the same width in the west drift as it is in the straight tunnel continued. The Parleys Park discovery shaft is sunk on the north side of that dyke and nine
116 feet from the north or hanging wall of it. I believe that same dyke appears at the surface in what is known as the Brockie cut, and so marked on the map. This dyke has a slight inclination to the north. The difference in elevation between what I believe to be the outcrop at the Brockie cut, and as it appears in the Como Tunnel north of the vein, is about 190 feet, and the distance it makes to the north, in going down a vertical depth of 190 feet, is about 40 feet. The Brockie cut, I think, is partially in the porphyry, and shows the foot or south side of the dyke. Carrying a line on the north limit of the dyke far enough easterly to reach a point opposite the Switzerland shaft, that point would be about the middle of the letter "P" in "Park" on the map, and about 165 feet distant from the Switzerland shaft. In the fall of 1874, and spring of 1878, there was a good deal of standing timber on the south and east of the Switzerland shaft and throughout the entire length of the Switzerland claim, and certainly within 500 feet of the Parleys Park shaft; such timbers as was put into the Parleys Park shaft. The trees are not there now, but the stumps are thick. I have seen the Accidental mining claim, and I was there a short time after it was located. All I then saw was the shaft on the map; it was being sunk, and was then probably 25 or 30 feet deep. This was about two months after the location. There was a notice nailed on a board, and the board nailed to a post standing a little to the southwest of the shaft and between the shaft and the cut marked "3" on the map. I did not read the notice fully, but enough to see it was the notice of the Accidental location; that it had on it the name Accidental, and was signed by Cassady. I afterwards saw a stake at the southwest corner that is still standing there. I saw it ten days ago, or about then. I have not been to the east end stakes, though they were pointed out to me standing at the shaft.

117 (Notice of location of the Accidental Mining claim read in evidence and marked "Exhibit 4.")

Witness continues: It was about the 13th of November, 1879, I

was at the shaft and saw work going on. There is a vein discovered in that shaft at the top or opening. It is 30 feet from the Switzerland shaft. I know Mr. Cassady, and while at the shaft he pointed out the boundaries of the claim, and they correspond exactly with the notice of location.

Cross-examined:

I have been acquainted with locations in that district since the 11th day of January, 1874. I am a civil engineer and mining surveyor. I have made frequent surveys in that district from that time. I have since then frequently done engineering and surveying for the defendant, Chambers. I think I have done about all such work he has had done there since, and have done a great deal of work for him every year. I think I first went to the Parleys Park discovery shaft, to particularly notice it; it was early in the spring of 1876; I knew the ground, more or less, from 1874. It was about 10 or 12 days ago that I found the timbers fallen in; prior to that, though in a somewhat unsafe condition, it was sufficiently open to pass through and out at the tunnel. I have no idea how the timbers came to fall in, but supposed it to be from the loose character of the rock that it had caved away and fallen in. The dotted line on the map, from "D" to "E" is a straight line, connecting the points "B" and "E," where the porphyry dyke is exposed, and it is assumed to be straight between those points, from the fact it is not exposed, and we have a right to assume it is straight, in the absence of other information. Porphyry does not always go in straight lines. Porphyry is found in that district at other points than I have described. The points I describe cut the stratification
118 and do not run parallel with it. The quartzite beds, when undisturbed, dip nearly to the north, at an angle of about 25 degrees. The porphyry there is standing at an angle of about 70 degrees, and in places nearly vertical. Porphyry does not occur there through the country formation. Another place where it occurs is in the works of the Ontario. Down as far as the discovery point, and from there on west it occurs; also, to the east of the works of the Switzerland, and near the Lady of the Lake main shaft, and down through the McHenry gulch there is a wide belt of porphyry. Its widest point is half a mile easterly of the Ontario, and it narrows as it comes to the west, so that in tunnel "A" it is only 23 feet wide. I think the porphyry marked on the map belongs to the belt further east. It is in wedge shape, pointing to the west. The porphyry found in the Ontario, I think is a part of same dyke lying on the south side of the Parleys Park discovery shaft. It is found in the 100 foot level, a little nearer the vein than it is at tunnel "A," and that would indicate the porphyry is irregular in shape and course. Porphyry is not like a stratified rock that is bedded and regular. It is an eruptive rock. You cannot determine its particular position without exploration. At the points "D" and "E" we fix it. If there were a series of points there to

the east and west in which it was disclosed, we would naturally assume that was the general course. To a certain extent that is inference. The inference is, that it is the same piece of porphyry. There is porphyry in the Switzerland shaft. You can find it on the dump and down the shaft, overlying the ore of the vein, and lying against and under the hanging wall, and also down through the drift. I saw porphyry in the Brockie cut on the surface, but do not regard it the same dyke that is in the Switzerland shaft; they are different. I don't know to what dyke the porphyry in the Switzerland belongs, or that it belongs to any dyke or system. I merely know it accompanies the vein
119 so far as the vein is disclosed. The porphyry, where it is cut by the Como Tunnel, is about 20 feet wide at the point "E" on the map. It is about three feet thick in the Switzerland shaft, and you have the same porphyry at the Accidental shaft, and at the open cut "A." I don't know the porphyry at the Accidental unites with the main body I refer to. There is no evidence that it does, and every evidence that it does not. I connect the porphyry in the shaft with the body found with the vein, and it might in the course of the development of the mine prove to connect with the main wedged-shaped body. It may connect with it and may not—it is a matter of theory until it is developed. Judging from the date of the location, I think it was in November, I saw Cassaday at work on the Accidental. I surveyed the Switzerland for patent, and I have not made a survey of the Accidental. The plat of the Accidental is made from the notice of location and the staking on the ground as pointed out by Cassaday.

ELSWORTH DAGGETT, sworn for defendants:

I am a mining engineer, and have studied and practiced since 1862. I have been engaged in the examination and working of mines, and studying them generally in a practical way for 14 years. I have been to various mines in Unitah Mining District at various times since 1869, or 1870. I have examined the Parleys Park claim; the first time I think about 18 months ago. I made a short examination of it then, another in May of this year, and again about ten days ago. .The examination included the Parleys Park, the Switzerland, Accidental, and Ontario, with the tunnels that are connected with and on the Switzerland, the Como and Switzerland tunnels, and the surface of the ground also. I was two days in the vicinity of the last visit, and then examined the Parleys Park discovery
120 shaft, the tunnel marked "A" on this map, and the cut at the mouth of it, the Como Tunnel and the east and west drifts from it, the Switzerland Tunnel, and the drift from it to the foot of the Switzerland shaft, the Switzerland shaft, the Parleys Park whim shaft, the main shaft as it is marked here, the Accidental shaft and the drift from its bottom, and what we called the Accidental cut, a little cut near the Accidental shaft. The cut at tunnel "A" is mainly in quartzite, more or less broken. At a distance of

about 40 feet from the mouth of the tunnel in a southerly direction, at the point marked "Vein" on this map, I observed a small vein in the Switzerland shaft, and at the bottom of the Accidental shaft, and in this cut west of the Accidental shaft is more like color, and softer than the other porphyry. The porphyry found in the end of the main Como Tunnel, or near the end, and at the end of the north turn of the west drift from the Como Tunnel has a blueish cast, or reddish cast, in both cases much darker and harder than the layer of porphyry which overlies the Switzerland vein.

Q. About what is the distance from the point marked "Vein" in the open cut at tunnel "A" to the bottom of the Parleys Park discovery shaft?

A. About 140 feet; the distance is not exact, it is about that.

Q. Is the same vein disclosed in the Como Tunnel, in the Switzerland Tunnel, in the Switzerland shaft, and the Accidental shaft?

A. I believe it is, and also at the point marked "Vein" in the cut.

Cross-examined by JUDGE MCBRIDE:

Q. What depth is the Como Tunnel below the top of the Switzerland shaft?

A. Vertical depth approximately 177 feet. The observations I made were taken with a pocket compass and chronometer, and may not be exact, but that is the approximate distance.

121 Q. What is the difference between the Como tunnel in depth and the top of the Parley's Park discovery shaft?

A. About 147 feet.

Q. Which is the lower of the two?

A. The Como tunnel is lower.

Q. Is the vein that is disclosed in the open cut in front or south of the tunnel "A" on that map disclosed at the surface?

A. It is: well, two or three feet below the surface; the cut discloses the vein. If there had been no cut there would have been no vein exposed. It is practically at the surface.

Q. How far is that above the Como tunnel?

A. I have no measurement that would give me that data, but I should judge eighty-five feet above the level of the Como tunnel.

Q. What is the character of that vein disclosed in the Como tunnel on which those drifts are run east and west from the tunnel: I mean as to its being a strata or fissure vein, conformable to the country or otherwise?

A. It is not conformable to the stratification of the quartzites on that hill. It is overlain by a layer of porphyry, so that it might be said to conform to the porphyry.

Q. What would you denominate it, a strata or fissure vein?

A. Fissure vein.

Q. Is a fissure vein always one that is not in harmony with the strata?

A. No, sir; a fissure may open in conformity with the stratifica-

tion; is more likely to open that way than crosswise or in any other one direction.

Q. Now, sir, if a vein running conformable to the strata of the country were encountered by a porphyry dyke such as that, would it not be likely to bend the course of it or change the course of it?

A. It would probably cut it or probably follow it, I should suppose.

122 Q. Would not that depend upon the angle at which it struck it?

A. I think the porphyry dyke would pay very little attention to a vein of that thickness. It would part it just as it parts the stratification of the country.

Q. It would, in your opinion, displace it?

A. It would displace the rocks of the country and displace the vein in the same manner.

Q. Are there not instances of porphyry dykes coming in contact with older veins and pushing them or bending them out of their course without absolutely cutting them?

A. I don't know of any such; I would like to modify that. If you mean actual contact I don't know of any instance, but I know of veins being bent by the effect of porphyry dykes where the contact was not direct; was not actual.

Q. At what angle does this porphyry cross the course of the stratification at the point you have described?

A. You mean the dyke or lesser layer of porphyry?

Q. I refer now to the main dyke.

A. That is nearly vertical in its position and the stratification of the country dips there about to the north at an angle of about 30°—20 or 30°—consequently the angle here would be 60°, in that neighborhood—the angle that the main prophyry dyke makes with the stratification at this point.

Q. You are speaking now of its course perpendicularly. I refer now to its direction longitudinally.

A. In other words, you want to know what angle the strike of the dyke makes with the strike of the stratification?

Q. Yes.

A. It is about 55°, I should judge.

Q. What is the strike of the dyke?

A. It is northeasterly and southwesterly, but it is nearer east and west than it is north and south. I presume this map is correct and here are the points where the dyke crosses the two branches

123 of the Como tunnel; and, if so, that would be a correct representation of the strike of the dyke at that point, and that bears, I should think, true meridian, north 60° east, south 60° west.

Q. Does porphyry usually occur regular in strata?

A. It is not a stratified rock; it is an intrusive rock.

Q. Irregular in form?

A. More or less so.

Q. It is more irregular than any stratified formation, is it not?

A. Well, not always. A dyke of porphyry is forced up from below, and in forcing itself up it assumes the form of the opening which it makes. If that opening happens to be a regular fissure, the porphyry dyke may be as regular as a perfect fissure vein.

Q. Is it not true that it is more irregular than the ordinary stratified rock of the country wherever it is found?

A. No, not always; sometimes stratified rock are disturbed and broken up so as to be as irregular as a porphyry dyke could be.

Q. I assume that may be, but it is not true, as a rule, that eruptive rocks are less regular than stratified rocks?

A. Yes, as a general proposition, I think that may be so.

Q. Do you regard these as large or regular bodies of porphyry, or are they fragmentary?

A. I regard this main dyke as a large porphry dyke. It has been traced for I think at least two miles. I think I have seen it in places a mile and a half apart.

Q. I will ask you if there is not a large deposit of porphyry lying to the eastward?

A. Yes, sir, over here, a continuation of this dyke.

Q. Does it not lie also to the south as well as to the east?

A. I think it is about due east from this point. I am not sure. I have seen the dyke down in the McHenry mine, which is almost due east from there, but I don't know where it is between in all places.

124 Q. Did you ever see the porphyry to the south of the road as you pass down from the McHenry mine?

A. Yes, sir; that would be about east from this place.

Q. How far south do you think it extends?

A. South of the road?

Q. Yes.

A. I don't know. Where I saw the evidences of porphyry was in a shaft or prospect hole somebody was sinking there close to the road; it was also on the north side of the road. Where the axis of it would be there, I don't know.

Q. Was there or not a large belt or breadth of porphyry—you know where the Lady of the Lake working shaft is—that new shaft?

A. Yes.

Q. You know the cut to the north of that on the hill?

A. No, sir; I do not. I have glanced over it as I went over the road.

Q. Can you tell the character of this formation in here?

A. I cannot; I don't know enough about it. I believe there is porphyry on both sides of the road as you go down from here to the McHenry. At various places there is evidences of it, and I have seen the porphyry at the McHenry.

Q. What importance do you attach to the difference which you observe in that character of the porphyry which you bring here?

A. None, except that the similarity of the specimens which were as near as we could get them average specimens, those at the turn

of the west drift of the Como, and overlying the vein at the turn sheet in the Como Tunnel, and at the bottom of the discovery shaft, at the bottom of the straight part of it, at the accidental open cut, and at the accidental shaft are all the same layer of porphyry, and that at this particular place is a different layer of porphyry from the one found at the extreme end of the west drift of the Como, and in the extreme end of the main Como Tunnel.

125 Q. Is it not true that same deposit of poryhyry will often display the same difference?

A. It might; yes.

Q. Without passing out from the same deposit?

A. It might; porphyry presents different appearances in different places.

Q. Have you ever examined the dump of the Lady of the Lake?

A. I never have.

Q. What then is your opinion as to the course of that porphyry which you have described as being in the Switzerland shaft, the Accidental shaft, and at the point you have described there in the winze?

A. Nearly east and west; it is approximately the same as this drift.

Q. Is not that more nearly conformable to the strata of the country rock than the dyke you have described below which you call the main dyke to the north of it?

A. You mean in strike?

Q. Yes.

A. I should judge it was a few degrees nearer the strike of the stratification than the main dyke, as indicated by those two points; however, the main dyke, as indicated by the general state of the entire country, would be east and west, and would conform to the strike of the stratification in the same manner that this does.

Q. Then the point of greatest difference in the strike of the porphyry and the country rock exists just about the point you suggested there, in your opinion?

A. The strike of this main porphyry dyke, as determined by those two points, is probably more different from the strike of the stratification at that point than the general strike of the porphyry dyke would be, because the general strike of the porphyry dyke is nearly east and west.

Q. More nearly in harmony with the country?

A. Yes; more nearly in conformation with the strike of the stratification.

126 Q. Do you regard the porphyry which you found at several points indicated here—on the surface, the Brockie cut and a short distance down the Parleys Park whim shaft and here—do you regard them as mere fragmentary deposits of porphyry, or do they belong to the main porphyry dyke, or what you call the lesser dyke?

A. I did not observe any porphyry in the Parleys Park main shaft.

Q. I understood you to say it ran in part of it?

A. No, sir; the Switzerland runs up into this layer of porphyry and the Accidental; I saw no porphyry in place in the Parleys Park main shaft.

Q. Did you notice none in that shaft?

A. I did not; it seems to me too far south for the main dyke and too far north for this lesser layer of porphyry.

Q. I want to find out whether it is found to exist in any of those places?

A. No, sir; I did not observe it.

Q. I understood you observed it in this Brockie cut?

A. The Brockie cut is very shallow, but I saw particles there that I took to be disintegrated porphyry, but I could not be positive about it.

Q. Is this porphyry shown to exist as Mr. Palmer has described it in wedge shape, passing down here, growing smaller, until at this point, say, it is only 23 feet; what would be your opinion as to its normal—its real course; I don't speak now of its apparent course at any of those points, but taking the whole system together at one dyke; what would be your opinion as to its real and true course?

A. I believe the general course of that porphyry dyke to be approximately east and west; that is, taking the dyke at its two furtherest points from each other; its course, as shown at this particular point, is as illustrated by those red lines.

Q. Is not the fact that it appears smaller at this point that mere fragments of it appear at this point—a very small limb or
127 branch of it appears in these works, merely fragmentary at the Brockie cut, and only three or four feet in thickness in the Switzerland shaft or works—evidence that these are but mere fragments of the main body of porphyry—of the porphyry dyke, and that you are approaching the westerly end of it?

A. That is quite a different layer of porphyry that you encounter in these works here from what you do here; it is a layer—it is a lesser dyke which may have been formed at the same time that the other was.

Q. Might it not be just a mere limb or branch of it?

A. It might have been a spur, but it would be a spur of considerable magnitude, and may have been formed at the same time.

Q. Is it anything unusual in these poryphyry dykes to find spurs running out from them, some greater and some less?

A. They do find it.

Q. Is it not ordinarily so that you find fragments or spurs of those dykes appearing at some distance from the main dyke before they disappear altogether?

A. Fragments of porphyry may be found outside of any dyke,

but ordinarily the dyke preserves its identity as well as a fissure vein would, and in fact it is a fissure vein in its geological sense.

Q. Was there any drifting along of the vein at the end of that cross-cut that you follow to the east from the main Parleys Park shaft—I mean to the south; was there any drift from that cross-cut?

A. Not that I could see; it was very much caved at that place; the porphyry had disintegrated and fallen down until it was three or four feet deep on the floor of the drift, and you could just crawl over that and get to the vein to get a sample. There may have been a cross-cut there, but I did not observe it.

Q. I mean any drifting in the vein itself?

A. I understand you.

Q. I understand you took samples from the vein showing
128 in the Parleys Park discovery shaft; is that vein distinctly traceable by the eye in the shaft?

A. It is; yes.

Q. Is the filling in that softer or harder than the surrounding country?

A. Softer.

Q. Is the filling fine or coarse?

A. It is a mixture; there are fragments and pebbles of quartzite in it, and some of them rounded, some of them showing evidence of having been washed in the interstices; between these fragments, filled with clay and sand, the whole vein presents the appearance that it has been filled by water washing the material into the seam.

Q. Would you call it a gash vein?

A. Yes, sir, I should; it has none of the appearances of being an extensive vein at all; there are no smooth walls that I can observe.

Q. Does it come together at any point?

A. It did not come together at any point I could see, but at the bottom it was very narrow, three inches, and at the top eight inches; I am inclined to think it would come together in depth.

Q. Was it observable on the surface?

A. It was—more readily on the east side.

Q. Did you take samples from any particular part of the vein with a view to getting any particular part of the filling?

A. I took samples from wall to wall of the vein—all the filling—with the view to getting an exact sample of the material composing the vein.

Q. A fair sample?

A. A fair sample.

Q. Was there any difference in the coloring of that vein in comparison with the surrounding rock?

A. I think generally it was whiter; the quartzite is generally grey, and the general appearance of this vein was whiter; there

were places in it where there was a slight yellow stain, or reddish or yellow stain, but very light.

Q. Is not the filling iron-stained color?

A. I presume the reddish color was due to oxide of iron.

129 Q. Does not that vein contain oxide of iron in your opinion?

A. Probably it does a very small amount.

Q. Is the work on the brown colored work on the map the first angle in it on the vein or not?

A. You mean the north turn of the west drift of the Como tunnel?

Q. Yes.

A. It is on the vein to this point of the turn — to where it turns north, then it leaves the vein.

Q. Where has this work been driven from or done from at the junction with the Como tunnel?

A. There is no other way of getting in there.

Q. What would be the object of work in that direction if the vein was here?

A. I don't know.

Q. Would any practical miner be able to explain, do you think?

A. I don't know, I am sure; I don't know the reason.

Q. You cannot explain why the parties left their vein and went to the north until they struck that porphyry?

A. No.

Q. Is there any practical reason suggests itself to you as a miner?

A. They may have done it with a view to delineating the course of the main porphyry dyke, which that work does do; that may have been the object.

Q. Is not that porphyry dyke disclosed in tunnel "A?"

A. Yes, sir.

Q. And developed in the main Como tunnel?

A. Yes, sir; there would be two points; a third point would settle still more solidly that course.

Q. You think those practical miners would probably want to know where this porphyry dyke went to?

A. I don't know; that may have been the reason; I don't pretend to say what the reason was.

Q. These works are at different levels are they not?

A. They are, some of them; this Como tunnel is all practically on the same level.

130 Q. They are correct in the same sense that if a person stands over them and looks down upon them they appear as they are represented on the map?

A. Yes, sir, approximately so; I did not make this map; I made a sketch, and that coincides to a great extent with it.

Q. Do you know of any large deposits of porphyry to the west of the Parleys Park and Ontario?

A. Only in the Ontario mine.

Q. In what direction from the Parleys Park shaft can you identify the existence of porphyry on the surface?

A. It is indicated at this Brockie cut.

Q. Well, to the westward?

A. I cannot identify it anywhere west on the surface, though my impression is that it is found in grading for the Ontario works; I think I have seen it there, but would not be positive.

Q. Where are they?

A. They must be somewhere about here.

Q. Not far from the end of the Parleys Park and situated on the Ontario ground?

A. I should judge so, and at a lower level than at the Parleys Park discovery shaft.

Q. Ask you to describe about the inclination of the hill there, and what direction it faces at the Parleys Park shaft?

A. The surface of the hill dips about south 35° west.

Q. Is the country rock in the vicinity here in place?

A. It is.

Q. Is it stratified?

A. The quartzite is stratified—the porphyry is not.

Re-direct:

Q. How many samples did you give to the assayer; I understand you gave the samples to Mr. McVicker?

A. Yes, sir.

Q. How many, and under what designation?

A. I gave Mr. McVicker seven samples altogether; the samples "A," "B," "C," "D," "E," and sample No. 6; samples
131 "A," "B," "C," and "D" were taken from the Parleys Park discovery shaft—taken ten feet apart.

Q. Such as you have described?

A. Yes, sir.

Q. Now the other.

A. Sample "E" was from the north side of the main porphyry dyke—right on the dyke and between the porphyry and the quartzite.

Q. And in what work?

A. In the tunnel "A," sample "F" was from the south side of the porphyry dyke in the same tunnel. None of those samples contain either gold or silver. They were all of them taken in new sacks and retained in my possession until turned over to McVicker.

Q. You turned over to McVicker those identical samples?

A. I turned over to him those identical samples.

Q. Now, sample "6."

A. That was from the Accidental cut. It was taken directly over the foot wall which appears in the bottom of that cut, which foot wall I believe is the same that the Accidental shaft was sunk on.

Q. That you also handed to Mr. McVicker as you had taken it from the ground?

A. Yes, sir; that yielded two dollars and sixty-two cents silver per ton. Those are all I took myself.

Q. Have you the certificate of those assays with you?

A. I have.

THE REFEREE: Q. Can there be a vein without containing or showing assays of silver or gold for a distance to the extent of that shaft?

A. Oh, yes; it is not essential to the existence of a vein in the definition of it that it should contain ore throughout—not in its technical definition anyway, that is to say, the geological definition of a vein is simply a fissure filled with mineral, under which a porphyry dyke is a vein.

Q. How is it with mineral bearing veins upon which mining is pursued—are there barren places where the vein still con-
132 tinues?

A. There might be.

Q. Is that so in practical mining?

A. They usually have a trace of precious metals in them. I would expect to find a trace. I don't know that I ever assayed material from what I knew to be a vein in some places very rich, but what it had a trace of the precious metals.

Q. You would always expect that in a vein in which, in any portion, ore was found in paying quantities?

A. I should anticipate finding a trace in any material of any part of a vein which did in any part of it contain ore.

Re-cross-examined:

Q. Is it not true that there is in paying veins, material found, often, that does not contain even a trace—utterly barren material —in which you don't expect to find anything?

A. Oh, yes; there would be some material. In a true fissure vein you could take a quartz crystal, a transparent quartz crystal, and it probably would not contain any silver in itself, but a sample clear across the vein where that came from, I should expect, if carefully assayed, it would show a trace of silver or gold.

Q. You don't mean to say then that the metal would be distributed through every part of the vein filling—you would not expect to find any part or portion of a vein barren, nor any of the material out of it?

A. We could doubtless select pieces of material from almost any vein that would have actually nothing in it.

Q. Is it not true that a large proportion of good paying veins is filled with mineral that has nothing in it?

A. Commercially valueless but in reality not valueless.

Q. I mean, what proportion of the material of a vein, say where there is 100 ounces of silver to the ton—what proportion of
133 the material is it that contains the ore—what percentage, assuming it was all evenly distributed through it?

A. It depends entirely—it might be very small—it might only constitute perhaps one per cent of the total rock.

Q. Is it not true that for instance in gold mines, that the actual percentage that contains gold is usually a very small percentage of the material found in the vein?

A. I could hardly answer the question; in mining for gold they take out almost all the material and work it; gold is there as gold, and they have to work all the rock to get the gold.

Q. Gold of course is metal, it is not ore.

A. It is metal.

Q. Must it not be the case, as a matter of course, under those circumstances where ore pays three or four or five dollars a ton, that the balance of the material of the vein is barren, and that a very small percentage of the material bears anything?

A. The gold is all mixed up with the vein filling as gold; if you could pick out that gold you would only have about a hundredth of a per cent. of the actual material in the vein, but you have to work the whole material to get the gold, the difference is just the difference between gold and rock.

Q. It is not the same as in silver ore, which assumes some other form, it is simply the difference between the metal and the material?

A. Yes, sir; in the case of gold it is gold, and in the case of silver it may be a sulphuret or some other salt of silver.

Q. Usually in mineral veins you calculate to find a trace of ore at every point?

A. I should always expect to find a trace at every point by a fair sample of the vein.

Q. If you were working a vein and actually found ore at some points, and at others found not even a trace, you would not say it was a mineral vein?

134 A. If in addition to the fact, I found actually no trace whatever of silver in it, I saw that it was a vein of no strength, showing no evidence of being a fissure vein and evidently filled by the washing in of surface material, I should say it was no vein.

Q. You did not answer my question; you put things to it that I did not. I asked you if you found a vein you knew to be mineral bearing; if you traced it to a point where you could find nothing in it; you simply did not find a trace, would you be willing then to state that was not a mineral vein at that point?

A. No; if I traced a mineral bearing vein to a point where there was nothing in it, and knew my tracking was correct, I should know it was the same vein that bore the mineral.

WILLIAM MCQUEEN, sworn for defendants:

I have been mining since 1862, and since 1871 in Utah; I am somewhat familiar with mines in Parley's Park district; I was there on the occasion Mr. Daggett has mentioned, and with him went through the works he has described; I examined the Parley's Park discovery shaft and saw Mr. Daggett take samples from it; he took

sample "A" about two feet from the bottom, and the balance taken ten feet apart up the shaft; I think four in all; I think they were fair samples of the rock found in the crevice; I examined tunnel "A" from the open cut in through to where it intersects this shaft, and I made measurements in the cut; we found a vein and a good deal of vein material in the open cut; I took a sample from there and had it assayed by John McVicker; the tunnel runs through quartzite in a ways, then it cuts a porphyry dyke or belt of porphyry before it strikes the bottom of the shaft; I measured the porphyry and it is about twenty-three feet thick; Mr. Daggett and I
135 came up within ten feet of the top of the Parley's Park shaft; in my judgment it would take two miners five days to sink that shaft fifteen feet; I traveled through the Como tunnel and at the inner end found porphyry like that in tunnel "A;" I believe I went to the extreme end of the east drift from the Como tunnel, and am not sure but I went out in the west one; in the north turn of the west drift there is porphyry, but not such as there is here; at the Parley's Park discovery shaft, it would look to me like the fissure in the quartzite rock had been filled from the surface through the action of water and material fallen in; I don't think there is a vein such as miners of average judgment would locate; I have a certificate of the assay of the ore sample from the open cut.

Put in evidence, Exhibit No. 6.

Cross-examined:

The only examination I made of the discovery shaft was by going in through the tunnel and up the shaft about thirty feet to within ten or eleven feet of the top.

WILLIAM F. JAMES, sworn for defendants:

I have been a miner about fifteen years, and about nine years in Utah. I have been to Parley's Park several times, examined different parts of the camp, and worked one property there. I first became acquainted with the camp in 1878. I know the Parley's Park and Switzerland claims and have made two trips there to examine the ground. The first was in January, 1880. At that time I examined an open cut about fifty feet south of the tunnel marked "A" on the map, the Parley's Park discovery shaft, the Switzerland discovery shaft, the drift from the bottom of the shaft that connects with the Switzerland tunnel, the winze that connects the drift from the Switzerland tunnel with the Como tunnel, and the drift running off into the hanging country from the vein; also, the drift running to the west, then turning and running into the hanging
136 country. I went into tunnel "A" to the bottom of the Parley's Park discovery shaft, and examined the vein probably for about ten feet from the bottom of the shaft up, and took a sample of ore right at the bottom; then went to the top and examined the vein down about ten feet, and assisted in sampling that. Mr. Colbath, Mr. Matthews, and Mr. Palmer assisted in taking the

sample. It was taken first by digging off the surface, so as to leave it clean down for about ten feet, then the digging was begun the entire width of the vein between the walls and for an inch or two inches deep all dug out up to the surface, and that sample remained in my pasession until I turned it over to Mr. McVicker about two or three days ago. I suppose the sample was probably fifty pounds, and fairly represented the matter in the crevice, and all the matter in it. I took the sample from the lower part of the shaft at the same time. That was assayed. I and Mr. Colbath turned it over to Mr. McVicker. That was taken in the bottom from the crevice on both sides of the shaft. It represented probably a couple of feet up and down both sides. It was as fair a sample as it was possible to take. I remained in my house until I turned it over to Mr. McVicker a few days ago. I have the certificate of assay. The samples I refer to are Nos. 1 and 7 on the certificate. I took samples in the Switzerland shaft, two samples, one down about five feet from the surface, another about four feet further down; those are Nos. 2 and 3. The next, sample 4, was taken from the junction of the Switzerland tunnel with the level that connects with the shaft. The next was taken where the Como tunnel connects with the level from that tunnel about eight feet to the right or east side of the tunnel as you go in; that is No. 5. No. 6 was taken from the open cut where the vein shows below tunnel "A."

They were taken all across the vein, and were fair samples.
137 They remained in my house until a few days ago and were then taken to Mr. McVicker; I was there again on the 22d of August, recently. On this visit I examined very carefully the open cut below Tunnel "A," through Tunnel "A," and examined the bottom and top of the shaft again but did not pass through it; then examined some little open cuts on the surface I should judge as represented here at the Brockie cut; then went to the whim shaft, went down that seventy-one feet and examined it as well as we could; then I passed through a drift off the south about forty-two feet and examined that; then we went to the Accidental and examined that and the open cut near it, between it, and the Switzerland discovery; then went into the Switzerland shaft and went through it and took samples as we went through; I assisted Mr. Colbath; I carried the tape line and Mr. Daggett and Mr. Matthews took the samples. We measured twenty feet and took samples, and measured another twenty feet and took another. The fourth sample came right at the junction of the drift with the shaft, and there we could not get a sample for it was lagged up; then we came twenty feet further into the drift and took a sample there; twenty feet more it was lagged up and we could not get a sample, but took it at twenty-five feet; that is all the samples we took in those works, and besides I assisted Mr. Matthews in taking a sample in the open cut below Tunnel "A." I found a large strong vein in the Switzerland shaft. The Como Tunnel is connected with the Switzerland Tunnel by a winze and the winze connects

with a drift connecting with the foot of the Switzerland shaft, and then you come up the shaft to the surface; these works are all on the same vein. I examined the Parleys Park discovery shaft on my last visit as carefully as I could without passing through it;
138 I examined it at the top and bottom, but not between points six or eight feet from the bottom and ten feet down from the top; after examining the bottom I went around on the surface and examined the top again; I examined as to the quality of the rock in which it is sunk as to hardness and softness; it is a brecciated quartzite rather loose and would be called easy working ground; I don't think it would be necessary to use any powder; two miners ought not to be over five days in sinking that shaft fifteen feet, and really ought to do it in three; I have been doing mining work the last fifteen years. On my last visit I saw some timbers lying on the dump at the Parleys Park discovery shaft; did not examine them particularly, just saw them lying there; it would depend on the convenience of the timber how long it would take two miners to get out and put in three sets of such timbers and two lengths of lagging; if they could be cut anywhere on the ground they surely ought to do it in three days, and if they were very convenient probably half the time; if they could be cut within 500 feet it should be done in two days easy enough; there is no windlass in the shaft; in my opinion there is not disclosed in that shaft a mineral bearing vein; I did not find any indication that it was mineral bearing nor anything in the matter that was there; the filling of the crevice is a broken quartz sand with a little clay mixture; the color is lightish brown, a little lighter than the country rock encasing it; I saw a porphyry dyke in Tunnel "A" about fifty-four feet from the mouth of it; I measured the dyke and it is twenty-three feet; the Parleys Park discovery shaft is on the north side of that porphyry; I examined the Brockie cut and found porphyry on the north side of it and quartzite on the south side; part of the cut is on the south side of the porphyry and part in it.

Cross-examined:

139 Quartzite varies a great deal in hardness; we find soft quartzite; find it near the Ontario where they have graded for the new hoisting works; you find quartzite there that is decomposed, and, in fact, there is no uniformity in the hardness of the rock; the quartzite at the Parleys Park discovery shaft is in place. The first time I examined the shaft there was but little loose material in the bottom; the tunnel is a little to the west of the shaft and is connected by a raise of the bottom and the debris naturally ran down this incline toward the tunnel; the tunnel did not reach the vein that went through the shaft; the whole length of the shaft is sunk in quartzite; I mean to say it is brecciated quartzite all fissured and broken up, and it could be broken very easily. The effect of the weather would cause it to slack and drop off near the surface; hard rock will do that more or less. I think two men

ought to sink that shaft five feet a day, or fifteen feet in three days. I should estimate the shaft to be about four feet by five and a half in the clear, aside from the timbering; one man could put up a windlass that would answer for that purpose in half a day; I put miners' wages at $3 a day and board; I think I could put up a temporary cheap windlass for a dollar and a half; if I was going to put up to be there permanently I would not put up one that would cost less than $8 or $10. Counting the windlass $10 the whole cost of sinking the shaft fifteen feet should not be more than $45 or $50. I call a mineral vein one that will carry mineral of any nature; I speak of mineral vein in the miner's sense—one that carries gold, silver, lead, copper or some other metal; I mean metal bearing vein; there may be a little iron in that vein; I am satisfied there is; I don't think there is any seam in that country you would not find some iron in; I would not locate this vein for any precious metals; I call it a gash vein, one that if you follow it any
140 distance in any direction, will lose its existence; there is a little fissure there in the surface that is filled with matter, a little more of the nature of vein filling than the general county; it is a little softer, a little clay in it, and of a sandy nature. As a miner, if I was to find this vein I would see what there is in it before I would pay for recording it; I might work an hour or two to see what was there, and when I discovered what there was I would abandon it; if I got a small trace it would not change my opinion. It appears a gash in the quartzite filled with this matter, and as you go down it has the appearance of disappearing; I don't think it is over an inch wide at the bottom where I took the sample.

JAMES MCGOWN, sworn for defendants:

I am a miner, and live in Park City; have been mining since 1862; I went to the Park a little over a year ago; I examined the Parleys Park discovery shaft the day before yesterday; I examined the shaft and sampled the vein; I found a shaft about forty feet deep; I cleaned out a lot of rubbish at the bottom of the shaft and also measured the timbers; the size of the shaft clear of the timbers is 3½ by 5 feet; that is, the inside clear of the timbers; that is by actual measurement; I had the tape on. The shaft is in quartzite, very easy to work for the first twenty-five feet; it is a little harder in the bottom but very good ground to sink in all through.

Q. For the first fifteen feet down what is it worth to sink that shaft?

(Objected to by plaintiffs' counsel, as the witness has only been in the camp a year. Objection sustained and defendants except.)

To the depth of 15 feet two average miners could sink that shaft about three feet a shift; that is an average day's work in that kind of ground; it is very soft, there is a gouge and no blasting
141 to be done; a shift is an average day's work; I can join with another man and sink it four feet per day, but hiring the

men, three feet is about what they would do. I took a sample from the bottom of the shaft, from the middle, and one from the top, fair average samples across the little gouge that was there; I had them assayed by Mr. McVicker and this is the certificate.

MICHAEL HAGGERTY sworn for defendants:

I have followed mining for a living the last ten years, off and on. I was down the Parleys Park discovery shaft and measured it. It is about 40 feet deep and 3½ feet by 5, by actual measurement; that is, the inside measurement, clear of timbers. I should judge that the timbers would square between 7 and 8 inches.

JOHN A. NELSON sworn for defendants:

I have lived in Uintah Mining District since 1872. I was acquainted with the Parleys Park discovery shaft in the summer of 1874, and up until October. I lived in the Lake House then, a short distance from the shaft. I have followed the business of mining for 16 years. I never measured the shaft, but up to October 5, 1874, there were three frames, and two frames lagged. It may have been 14 or 16 feet deep when Harrington quit it the last time in 1874. That was along about the middle of July. I put down a hole 4½ feet deep in about 2½ hours one forenoon in the same reef and same character of rock, about 140 or 160 feet from there. In 1874 there was a clump of standing timber right above the Brockie, and thick timber scattered across the flat on the north side of the main hill there, about 300 feet from the Parleys Park shaft. In 1872, after Harrington left, I was down in the hole, and it was about 9 feet then, and no timbers in it. In 1874 they sunk it 6 feet further along there. The men boarded at my house.

142 They put in three frames, and lagged two of them. The timber is right handy; and if I got $3 a foot for sinking that distance, I would think I was doing well. I don't think there was ever a pound of powder burned in there. Three dollars a foot would have made good wages—five or six dollars per day.

Cross-examined:

In the work of 1874 three men worked there. I saw the parties at work in 1874; they were Langford, Morey, and another man—Morey's partner. I think Morey and his partner worked a shift and a half each. A shift is a day's work, whether eight or ten hours. They paid a dollar a day for their board. Langford worked longer; he got out those three sets. He may have worked two or two and a half days. When Harrington came out he instructed him to only do a little work. He says: "Hank, don't do more than fifty-five dollars' worth, because that is all there is in the pot." "I will allow you five dollars per day and the other men four." He said this right in my presence, in the Lake House, above Park City. He made the remark to Henry Langford. Langford hired Morey and the other man, and they went to

work. Harrington left Langford in charge and went off to Salt Lake City. It would cost a little more now for the timbers. I sunk a shaft this year 24½ feet, and timbered it for $100. The tools were furnished and the windlass for the work borrowed. In bigger shafts than the Parleys Park I have in an afternoon put in five sets of timbers by having a man to hand them down. The shaft I sunk was quartzite on one side and porphyry on the other. I think I would take the porphyry half a dollar a foot cheaper; it blocks out so nice, but it don't break any easier. I have been active in this in procuring witnesses, &c., at the request of defendants' counsel.

PHILLIP R. WELCH sworn for defendants:

I am a miner and prospector, and live in Park City. I
143 have been acquainted with the Uintah Mining District since about the eighth day of September, 1874. I have seen the Parleys Park discovery shaft. I first saw it on the 9th or 10th day of September, 1874, and then examined it. There were three sets of timbers in it, and it was sunk one or two feet deeper. It might be fifteen or seventeen feet deep. It was between the first and the middle of September, 1874.

MARTIN K. HARKNESS sworn for defendants:

I am a mining superintendant, and have followed mining about 30 years; I have visited Parleys Park three or four times within the last ten years; I know the Parleys Park and Switzerland claims and have examined them on the 22d day of August, 1880; the first point we examined in the conflicting ground is tunnel A, located on the map; my attention was first called to the vein indicated at that point; Mr. Janes took a sample; I noticed the vein at that point to be about two and a third or three feet wide; that is in the open cut at the point marked here; that is 53 feet from the mouth of this tunnel, I think; then we passed into the tunnel a distance of 64 feet, and came to a porphyry dyke which crosses I should say very near where those dotted lines are on the map, and is 23 feet wide: beyond that to the cut where you turn to strike the bottom of the Parleys Park shaft the distance is about nine feet down the north side of the dyke; then you pass through a slight raise to the bottom of the discovery shaft; I was at the bottom of the shaft, and examined it there carefully in regard to the vein and estimated the depth of the work by looking up; I afterwards examined from the surface by looking down; I did not pass up through it; it is sunk in quartzite, and I should pronounce the entire depth easy rock to excavate and particularly near the top; I could see down
18 or 20 feet, it was quite light; there is a fissure indication
144 of a vein, I examined the filling of that gash or fissure; it is quite similar to the surrounding country rock, and I venture the opinion that it had been filled in that way by the surrounding country; I did not observe anything I could call ore; it would be my opinion there is not a mineral vein, as commonly understood

among miners, in that shaft; I should think it would take two average miners not to exceed five days to sink that shaft 15 or 16 feet, and six days to sink it and put in three sets of rough timbers and two sets of lagging from the top; that would be equivalent to one day for two to do the timbering; windlasses are ordinarily very rude constructions; I think a person with ordinary conveniences would erect one suitable for any hoisting that would have to be done there in half a day; I examined the Como Tunnel; in the inner end we found a porphyry dyke; I did not measure the dyke at that point; my note says, "Porphyry dyke lying north of vein as large and of same character as found above." I should presume however, at that point it would be more than 30 feet, perhaps more than 40 feet; the face of the tunnel rested in quartzite; I explored the inner end of the west drift from the Como Tunnel; the inner end of that is in porphyry and has not cut through it; I examined the Switzerland discovery shaft and found it a good vein from top to bottom; I examined the Accidental shaft, and there is very little if any indication of a vein, from a depth of 51 feet there is a cut run back southerly for 32 feet, and at that point the vein is cut near the end of the drift; you first pass a stratum of clay four feet wide stained with iron, then you get to the vein; I examined the drift from the Switzerland Tunnel to the bottom of the Switzerland shaft; that connects the Como Tunnel with the Switzerland Tunnel above, that winze is nearly vertical, perhaps 65 degrees; I observed the taking of samples in the Switzerland shaft, and of a portion through here; they were taken by Mr. Colbath and Mr. James, or perhaps Mr. Matthews.

Cross-examined:

I was on the surface at the Parleys Park shaft and looked down. I should say the fissure is ten or twelve inches wide—probably twelve inches. The filling differs very little in texture or color from the surrounding rock. It might have become lighter colored from leaching. I cannot say I observed any stains. The country in the vicinity, near the surface, is stained with iron—some places the quartzite is reddish in the small breaks. Iron occurs there in that vicinity—iron stains. If I should find that fissure to day I hardly think I should spend the time to investigate it to any great extent. It is very loose filling, and very improbable filling to find ore in. A good many veins carry very loose filling. If it is loose sand and gravel it is evidence it is not good for anything. I would not expect to find loose sand and gravel at the surface in a vein. I did not dig into it; the only examination I made was from the surface looking down. I certainly think I would not locate it or investigate it—possibly miners might differ about it. Most assuredly in a mining camp a fissure in the country rock a foot wide would challenge investigation if it had the appearance of being mineral bearing. There are a good many veins about there. My impression about this one would be that it was filled from the surface by the imme-

diate surroundings, and I would not investigate it—I say as soon as I discovered the filling of that vein that it come from the surface surroundings, I think I should have let it alone even at the depth of two feet. If I found it contained mineral—silver and gold—of course that would make a difference. If it had carried a trace of two or three ounces per ton, I don't think it would make any difference in my opinion. I don't know that it would then
146 necessarily be a mineral vein. In a mineral vein I would require a fissure filled with mineral matter—mineralized matter—with walls and clearage, which conditions would be quite different from this. This has sides of quartzite. At the bottom it is very small, it has come down to a seam half an inch to an inch, and it seems from my observation that it has grown gradually smaller. This sometimes occurs in true fissure veins; it frequently occurs, but in that case the seam is filled with a quite different matter. Sometimes veins get poorer and sometimes richer as they grow smaller. There are places in the best of mines that are not over an inch wide, and sometimes carry merely clay, which is valueless. I presume this would be defined a gash-vein, which is one usually with the largest and widest end up, closing at the bottom, and is obliterated.

GEORGE CULLEN, sworn for defendants:

I have been mining for over twenty years. I recently examined the Parley's Park and Switzerland mining claims in company with Mr. Colbath. I was on the surface at the discovery shaft, and looked down it, and was also at the bottom of it. Went in through a tunnel. The shaft is sunk in quartzite. It did not look to be a hard rock—rather a shelly rock. There was a little seam pointed out to me as what they called the vein; near the surface it seemed to me six or eight inches wide—no more than that, and I noticed through the shaft it varied from one to four or five inches down the shaft, and right at the bottom I picked in it at one place and I could scarcely discover any seam at all. It was filled with what appeared to be a quartzite gravel and sand. I should not consider it a mineral vein unless you took the whole quartzite belt as mineral vein.

JAMES E. MATTHEWS, sworn for defendants:

I have been a miner for nearly thirty years, and I am ac-
147 quainted with the Uintah Mining District. When I was last there on the 22d of August of this year, and also on the previous occasion, I examined the Parleys Park discovery shaft, passed over by the whim shaft, went through the Switzerland shaft, the Switzerland tunnel, and the Como tunnel and its workings; and on the last occasion I visited the Accidental, which is still further east. I examined the open cut leading to tunnel "A;" the cut is in quartzite considerably broken up—loose, shelly, to within fifty-three feet on the slope of the hill to the mouth of the tunnel, where we

found the vein; I assisted in taking a sample with Mr. James, and others were present; I assisted in taking two samples from that place—one on the last occasion. Tunnel "A" enters the country in quartzite and continues in quartzite sixty-four feet, where we arrive at a porphyry dyke which is twenty-three feet through, and passing through that we come into quartzite again for a distance of eleven feet to where we come opposite the south side of the discovery shaft; this is continued about four feet further to take it back even with the north side of the shaft, making the entire tunnel a distance of 100 feet; then run on an incline up to the foot of the Parleys Park discovery shaft a distance of probably eight feet; I examined the bottom of the shaft and up as far as I conveniently could, and thence from the surface down; last January I came down in the shaft a distance of ten or twelve feet and took a sample from the top down on a fissure that is exposed in the shaft; I never have passed through the entire distance of the shaft; the shaft is sunk in porphyry easy to work—shelly, considerably broken up and crushed; the crevice is probably eight or ten inches wide on top where the shaft is started, and is a rough broken crack in the rock without any show or appearance of friction or action of vein matter;

148 it is a crack in the rock, and in my opinion filled by washing in from the surface; a portion of the filling is clay and sand; the harder rock is quartzite, some of it washed, and shows the action of water and wear, which has rounded the corners considerably, and there are angular fragments which fill in with the clay and sand, filling up the seam; I could see no difference between the hard quartzite filling and the country rock, except it was in pieces; some of it is stained with iron and some of it shows no more stains than the country rock; the quartzite enclosing the seam is certainly not what would be termed walls of a vein; they are rough, and look as if at some time the ground had been cracked and the opening filled by the action of the elements; it is not in my judgment a mineral vein; I took a sample from there on my first visit, and again with Mr. James and others last January; the first sample was taken by me to Mr. McVicker, and the last one was taken by Mr. James, and is the same he has testified about; on my last visit I did not take any samples from the shaft, but saw some taken by Mr. Daggett at different points—one from the top; I think it is "D;" I have had a great deal of experience in sinking shafts and driving mining work; I have been engaged in it more or less for twenty years; I should judge two average miners could sink that shaft fifteen feet in four days, or five days at the furthest, and they ought to put in three sets of timbers and two lengths of lagging in one day easy enough, with timber accessible within from 300 to 500 feet; I have never seen any windlass on the shaft; I have examined the Switzerland shaft with its connections to the Como tunnel and the Como tunnel; I think this porphyry dike is disclosed 120 feet from the Switzerland vein, which is cut by the Como tunnel, and the tunnel passes through the dike a distance of twenty-four feet and

enters and continues in the quartzite twenty-seven feet beyond it; the
porphyry there is twenty-four feet thick; the porphyry
149 is exposed by following the west drift from the Como tunnel on the vein out to the turn to the north, it then runs through a small vein of porphyry, which lies upon the vein, into the quartzite, follows the quartzite into the porphyry dyke, and ends about six feet in the dyke. I think that porphyry is exposed at the Brockie cut on the surface, which exposes the south side of the porphyry. About thirty or thirty-three feet from that there is another hole sunk, which exposes the other side of the dyke, and which would make it square across twenty-three or twenty-four feet, which satisfies me it is the same dyke. The Parleys Park discovery shaft does not enter the porphyry, but is on the north side of this dyke. The seam in the shaft is magnetic, east and west, as near as I could make it. There is porphyry lying right on the hanging, or north side of the Switzerland vein. This exposed in the Switzerland tunnel, drift, and shaft, and the Como tunnel. Going in through the Como tunnel it cuts the Switzerland vein at a place marked "Turn Table," there is a drift run to the west on the vein a distance of seventy-six feet; also, a drift in an easterly direction from the "Turn Table," on the vein seventy feet to a winze connecting the Como tunnel with the Switzerland tunnel, then follows the vein east sixty feet to where a drift has been run in from the Parleys Park whim shaft, and from that sixty-three feet further to the face of the drift, which is still in the Switzerland ground, the same vein unbroken all the way. The winze connecting the two tunnels is in the vein. The vein is very plainly marked in the drift connecting the top of the winze with the bottom of the Switzerland shaft, and in the Switzerland shaft. Mr. Colbath really dug the samples in the Switzerland shaft. I took them and Mr. Daggett checked them off. They were
designated Nos. 7, 8, 12, 13, and 14. I kept them until I
150 gave them to Mr. McVicker for assay. I received a certificate of the assays, this is it: The other samples in the certificate were taken, No. 1 from the outcrop of the vein in the open cut south of tunnel "A;" No. 2 from the end of the drift running southerly from the Parleys Park whim shaft, seventy-one feet deep, which brings it into the Switzerland vein; No. 3 from the end of the drift running southerly from the Accidental shaft, and six feet from the end of the drift; No. 4 is taken thirteen feet from the end of the same; No. 5 is taken from the vein in the Accidental shaft, about ten feet from the bottom. The Parleys Park whim shaft is sunk through broken brecciated quartzite. There is no vein in it. The drift from it runs south 25° east, a distance of forty-two feet, where we find porphyry, which is about four feet thick, and passing through the porphyry we find vein matter, which is the Switzerland vein, and sample No. 2 was taken there.

(Witness withdrawn from the stand by consent for the present.)

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(Witness withdrawn from the stand by consent for the present.)

JOHN MCVICKER, sworn for defendants:

I gave the certificate of assays shown to me, and it is correct. I am an assayer. Those samples marked Ontario "A," "B," "C," "D," "E," and "F," and No. 6, were brought in by Ellsworth Daggett, and I made the assays of the samples left by him. Certificate put in evidence, and marked Exhibit 5.

This is a certificate of assays of samples left by Wm. McQueen, marked Ontario tracing "H," gave $26\frac{26}{100}$ ounces silver—no gold.

This is a certificate of assays for Colbath & James, samples marked 1, 2, 3, 4, 5, 6, and 7. The samples were brought in by Colbath & James, and I assayed them correctly—made duplicate assays. Certificate put in evidence, and marked Exhibit 7.

The paper just handed to me is a certificate of assay of
151 samples for Jas. E. Matthews, marked Ontario ore Nos. 1, 2, 3, 4, 5, 6, and so on. Certificate put in evidence, and marked Exhibit 8.

(This certificate is of a sample delivered by James McGown. Certificate put in evidence and marked Exhibit 9.)

Cross-examined by Judge MCBRIDE:

Question. You say at the time that you made these assays you had no assistance?

A. Yes, sir.

Q. Who assisted you?

A. Mr. Parker pulverized them.

Q. Anybody else?

A. No, sir.

Q. Now you say those are correct assays?

A. Yes, sir; correct assays.

Q. Is it not true that among assayers there is a difference in the results of their work?

A. Oh, sometimes we vary; but we generally come close together.

Q. Is not it true you sometimes vary two or three or four dollars a ton?

A. Yes; where there is a value, but where there is nothing, we come close.

Q. Is not it true that sometimes where one assayer will return two or three dollars a ton, another assayer will find nothing; is not it true that, as between assayers, sometimes one will return nothing, while others will return either a trace or sometimes one or two or three dollars?

A. They could not.

Q. Is not it true they do?

A. I don't know; an assayer generally calls a trace of silver more than a few cents; an outsider might call a trace of silver two or three dollars; then it is a doubt whether it is in the ore or not, because the litharge contains a little silver.

Q. In every assay that is made, is there not silver used?

A. Well, there is a little silver in the litharge used.

152 When you say there is none, is there not sometimes a doubt whether you have not, in excluding the silver in the litharge, excluded the silver in the material?

A. No, sir; because it is our duty to keep run of the litharge, and every day we keep run of our litharge right up to the cent; we get our litharge from Callahan, and it is very free from silver.

Q. In making these assays, was there any silver appearing as the result of the assay at all?

A. In some of them I could not see anything.

Q. Not even the silver that was in the litharge?

A. Not even the silver in the litharge; if I cupelled high I would not see it; if you cupell them low then, as a rule, you may see something that contains the silver.

Q. But if you cupelled high you could not see anything?

A. No; we make duplicate assays, and one is a check on the other, and then cupell high and low.

Q. You say in the cupell there was in some instances a showing of silver which you attributed to the litharge?

A. I did; we get a button out—240 grains or 200 grains silver—that is in the litharge, then take that amount of silver from the assay, and if there is anything put it in the assay; no matter if it is ten cents; if there is nothing there, nothing but what is in the litharge, we put nothing in.

Q. It is a very delicate matter where there is a small amount of metal, is it not?

A. No; I don't think it is.

Q. Do you think any man but one who understood the subject pretty thoroughly could make it where there is a small amount of ore?

A. I should think if he kept track of the amount of silver he used in his fluxes he could get it.

Q. Don't it depend on the state of the blast—the fire—the amount you use in cupelling?

A. Yes; it has a good deal to do with it.

153 Q. Is is not true, that a man may, by cupelling high, destroy a dollar or two in silver to the ton, or even more?

A. Well, I don't know; it takes a good deal of heat to volatilize silver; may make it out in small quantities, but where it is in large quantities we meet with some loss; in low grade ores we do not.

Q. How do these differences occur between assayers?

A. I don't clearly know; I can only answer for my own work.

Q. Does it not grow out of the fact of the manner of the operation; that is, I mean to say, assuming that the parties act honestly about it?

A. There is a little in cupelling sometimes with too much heat; lose it sometimes in the slag, having the slag too ———. Assay-

ers generally break their assays pretty well, then give it proper time in the furnace.

JAMES E. MATTHEWS cross-examined by Judge McBRIDE:

Q. About time what was it last fall you went into the Parley's Park and made the first examinations you have spoken of?

A. I think I went up on the 22d of November and continued the examination for three or four days—the 23d, 24th, and 25th, I think, I was at and over the ground.

Q. Was that the first examination you had made?

A. That is the first examination I made of this ground in controversy. I passed over the ground in '72, but made no examination of the ground at the prospect holes around there.

Q. You speak of being there with Mr. Cassidy?

A. No, sir; Mr. McCaskell—that was in November last.

Q. Was that before or after the location of the Accidental?

A. I did not know where the Accidental was located; I did not visit it, and heard nothing about the Accidental at that time.

Q. At that time you knew nothing of the Accidental?

154 A. No, sir; never heard of until this last visit.

Q. Who requested you to go and examine the property?

A. Mr. Chambers.

Q. What property did he say he wanted you to examine?

A. He went and pointed it out to me—the Como Tunnel, its workings; the Parleys Park discovery shaft: this tunnel "A" and the open cut; the Switzerland discovery shaft down through it, out through the tunnel, and through this winze, connecting the Switzerland Tunnel with the drift from the Como Tunnel east, and the Parley's Park whim shaft we went and examined upon the surface, but did not go down it at that time.

Q. You say you don't regard the fissure or vein which is found in the Parleys Park shaft as a mineral vein?

A. No; not in the general acceptation of the term among miners.

Q. What would you describe as a mineral vein?

A. A mineral vein among miners is known as a vein bearing precious metals, or it may bear iron alone; that would be called a mineral vein, but the general acceptation of a vein, is a vein coming from below and filled, bearing more or less precious metals.

Q. Then you don't regard a gash vein as a mineral vein in any sense?

A. Well, yes; there is what is termed a cash vein, but I don't really know the definition of the word gash—only I believe it is applied to veins open from the surface down and giving out.

Q. Do you know the term false vein?

A. I believe that would be the same.

Q. Do you regard those as mineral veins in the mining sense?

A. Some of them, I believe, do bear precious metals.

Q. You regard, then, a mineral vein as one simply bearing

precious metals, without reference to whether it is continuous or a true fissure from below?

155 A. I would term that a pocket or deposit—a surface deposit.

Q. If it had defined walls, and was a vein in point of fact instead of a deposit—there is a distinction between a vein and a deposit—if it was an open fissure, and the only distinction between that and a true fissure being that a true fissure is continuous downwards for an indefinite distance, would it then be a vein?

A. Oh, it certainly would. The difference, however, between this seam spoken of at discovery shaft and what I would term a gash or false vein is that any solution holding precious metals running in there, and precipitating them in that position, will cause more or less friction upon the walls; it does not leave it in its rough natural state. This shows no friction at all. This shows a rock broken in its natural way, without any friction whatever in the filling. Any solution that would hold precious metals in solution would affect the walls more or less.

Q. In this particular case I understand you to say the vein is within walls; that is, it has boundaries of rock?

A. Yes, sir.

Q. In that respect it does not differ from any other fissure?

A. It is evidently a fissure—has been. It is a crack in the rock.

Q. Why is it you say it being within walls, as any other fissure; why is it you say it is not a mineral-bearing vein; is it because of the absence of mineral?

A. It certainly is, and it does not show the characteristics nor the effect upon the walls that mineral-bearing veins would produce.

Q. Suppose you found such a vein as that with mineral in it, would you call it a mineral-bearing vein?

A. If I found it bearing mineral, I would call it a mineral vein.

Q. Then you don't require it should have selvage or

156 cleavage to appear on the wall in order to be a mineral-bearing vein?

A. I have already explained if I found mineral in there, I would naturally conclude in that state of affairs that it had been washed there from fragments on the surface.

Q. Would you then call it a mineral-bearing vein?

A. Yes, but not in the general acceptation of the term.

Q. The reason why you say it is not a mineral-bearing vein is because of the absence of mineral?

A. Yes, and the general effect upon the casings or sides of that seam.

Q. You have not traced this vein to its source or to its end on either end of the vein, pursuing it on its strike, nor have you traced it out of existence at the bottom, have you?

A. I have not.

Q. That being so, you don't know that it is not a continuous vein?

A. No; I am rather inclined to believe it does go to a considerable depth.

Q. That being so, is not the reason that you say it is non-mineral bearing, that you describe it as not a vein upon which a miner would locate, because of the absence of mineral?

A. Well, that and the general surroundings of it. There is a very good reason why that fact should appear there. It appears there and appears also in the Como tunnel, beyond the dyke, and some ten feet from the dyke is seen a similar seam without any filling at all. It is also seen in the Ontario 600-foot level, and I account for that seam by the dyke being thrown up there in a heated state, and when it cooled it caused those fissures.

Q. You think you have seen that same seam at a depth of 600 feet?

A. It may not be continuous, but you will find seams on the top or hanging side of that dyke all the way down, from the cooling process—the shrinkage in the cooling.

Q. You say you saw it also, or saw a seam, in the Como tunnel?

A. Yes, sir. Ten feet from the north side of the dyke in
157 the Como tunnel there is a small seam; it is probably no more than half an inch open, and no kind of filling in it at all, which would still help to bear out the theory I have.

Q. Is there any part of this seam in the Parley's Park you speak of that has no filling?

A. I think at the bottom; I don't think I can stick my cane down in the bottom; it is open so far as I could see; there was no filling any more than just what had fallen in from the dirt rattling down.

Q. Is it continuous through the shaft there?

A. Yes, sir; you mean continuous from top to bottom of the shaft.

Q. Yes; is there any place where there is no vein or vein filling?

A. I don't think the same crack continues all the way through from top to bottom; it runs down from the top, narrowing down about twenty feet, when there is another seam sets in this way, pitching a little more to the north; this top one runs almost vertical, and there seems to be about four inches of a bar, and the other one starts in here as though they had been about the same thing with this bar between them.

Q. There is a second seam that starts underground?

A. Yes, sir.

Q. The bottom seam or the seam in the bottom of the shaft is not the same as that in the top of the shaft?

A. As near as I could observe from the distance I was from it, there was a little bar between the two seams, as though the seams had run down here and stopped there, and another one started off here in that way.

Q. Will you give your estimate of the average width of the vein from the top to the bottom?

A. I should judge it to be; the average from top to bottom probably four inches.

Q. What is the width of the vein at the surface?

A. I think probably ten inches.

158 Q. What is the character of the surface rock at that point as to its being mineral bearing or mineral stained?

A. The outcrop of the seam is a little darker stained than the country around it but very little; I could scarcely see any perceptible difference.

Q. Is it sufficient to attract attention?

A. Probably might attract attention, but no more than you will find in any quartzite country, particularly where it is ferruginous; it is iron stained.

Q. If that shaft was entirely obliterated, and you came along there and found that seam or vein there, knowing what you do of the country there, would you consider that one upon which you could make a location?

A. No, sir.

Q. If that ground was vacant to-day with the shaft taken away and that vein exposed as it is at the surface, do you think you would sleep before you made the location?

A. I think I would sleep a good many nights before I would make a location at that point or on any such vein as that; if it would attract attention at all, I think I might knock off a little of the filling I described.

Q. If you should take out of that vein in addition to what I have stated some of the material and have it assayed, and it should return you an assay of gold and silver, what then would you do?

A. It would depend on the quantity; if I thought it was going to be valuable, I would locate it.

Q. If it showed a small amount—a few ounces of silver?

A. I don't think I would locate it; I would take it to be matter washed in.

Q. Would you take it then to be a mineral vein?

A. It would be a good deal owing to circumstances.

Q. When you speak of a mineral vein have you not all the time in your mind the fact that it should be valuable to work as a mine?

A. No, not at all times.

159 Q. As a matter of fact is not there a great deal of early work on mines that is entirely unproductive, the mineral contents of no value that will repay the working?

A. I have no doubt there is a great deal of labor expended upon mines that is not unproductive.

Q. Are you acquainted with the mines there in the Park district?

A. Very little.

Q. Do you know whether or not they crop heavily to the surface as a rule.

A. I know the Ontario crops out very nicely.

Q. How wide is the Ontario at the surface?

A. I think two feet and a half or three feet wide—something like that. I won't be sure about that.

Q. Do you think the Ontario vein at the discovery was any wider than this?

A Yes, sir.

Q. Do you know how much the ore assayed at the surface?

A. I don't know exactly, right at the surface where it was discovered, but I was there in the fall of '72 and took a sample from there; I did not take it from rock in place but ore that was thrown out on the dump, and it was only worked a very few feet in depth; just a little open cut; I took a sample of that and it went 160 ounces in silver.

Q. Did you ever undertake to trace this vein on the surface in either direction from that shaft?

A. I did.

Q. With what result?

A. I found no continuation of it at all. I did not attempt to uncover it, or anything of that kind, to follow the outcrop or tracing. You can find no outcrop any considerable distance from the shaft that would furnish any information at all.

Q. How far can you find it?

A. I don't think westerly you can find it at all and easterly probably for ten or fifteen feet: I don't think more than that.

Q. It is your opinion though, as I understand, it extends westerly?

A. I have no doubt this crack does. Whether it is open
160 on that side large enough to be filled in from the top or not I could not say.

A. You have never seen the bottom, so that you don't know but it may have been filled from the bottom?

A. It is hardly reasonable to suppose that it was.

Q. You was not there when it was filled?

A. No; I was not.

Q. Your opinion is an inference of your own as to how it was done?

A. Certainly; I take the reasonable conclusion after observing it closely.

Q. Have not you seen locations made on veins less prominent than that by miners?

A. Well, I don't know, less prominent I think maybe I have, but less promising certainly not.

Q. Is not your opinion governed largely by the fact that you have gone down and found nothing in it rather than the appearance from the surface?

A. No; that is not what I base my opinion on at all. If this had the general characteristics of a true vein, a mineral bearing vein, the fact of its pinching would be no discouragement?

Q. What do you call that?

A. I would call that a conglomerate rock stained with iron.

Q. Is there anything in it?

A. I don't presume there is any silver in it; there may be and may not be.

A. Would you make a location on a vein of that kind in Park City?

A. I would not without testing it. It does not look like good vein matter at all.

Q. As a miner, would you regard that as vein matter?

A. I don't know; it is owing to where it came from.

Q. Is that vein matter?

A. I don't know whether it is or not.

Q. Would you regard such stuff as that as country rock anywhere?

A. You may find such as that existing in the country rock.

161 Q. Ask you as a miner whether you ever find that as country rock anywhere?

A. I can't say that I find such rock as that existing in very great bodies as country rock.

Q. Would you not call that vein rock or properly vein filling wherever you find it?

A. I could not tell, that would require a test.

Q. I am not speaking now of what may bear silver or gold but I am speaking now of vein matter, gangue in which mineral may be found?

A. I suppose that that would properly come under the head of vein matter, but you can very frequently find such nodules as that existing in quartzite where there is no vein near it.

Q. Nevertheless you don't conclude it never belonged to a vein?

A. I would call that probably an eruptive rock and stained from eruption.

Q. Call your attention to a piece which I now show you, which is a piece from which Mr. Morey had an assay made, the other portion having been assayed. Ask you whether you call that vein rock or country rock?

A. Well I could not say whether it is vein rock or country rock, but it has evidently been impregnated with fumes of mineral.

Q. Have you any idea what it contains?

A. I should judge it was stained with iron.

Q. Does it not contain iron?

A. It may not contain a very heavy per cent, it is iron ore evidently; there is some iron; very little iron will constitute iron ore in an oxidized form.

Q. Ask you whether or not there is any such material as that I now show you, being the sample of rock brought by Mr. Trewick, as coming out of the Parleys Park vein, in that seam in the Parleys Park shaft?

A. No, sir; I found nothing of that kind in the vein.

162 Q. You saw nothing of that kind in it?

A. No, sir.

Q. What do you call that?

A. I call that a conglomerated rock, a cemented rock, pebbles of quartzite, and a little iron rock cemented together with iron.

Q. Is that called vein rock in the miner's sense or is it country rock?

A. You very frequently find that existing as country rock in large masses thrown out; it is not a country rock proper; it is a cement which does not exist as a general thing as what would be called country rock.

Q. In your opinion does that rock carry any mineral?

A. It carries iron.

Q. Do you think it carries anything else?

A. Nothing else in the way of metal, in my opinion.

Q. If you should find a vein of that kind of rock in the vicinity of the Ontario mine would you locate it as a mineral vein?

A. I would test it first.

Q. That would be with reference to its value, would you regard it as a mineral vein subject to location?

A. It would be owing to the position in which I would find it; if I found it lying in a mass on top I would not; I would consider it was cemented together by some process of heat and pressure; I will locate and work anything that will pay.

Q. Is not that really the test by which you determine whether a vein is a mineral vein?

A. No, sir, not always, not at all.

Q. Are you not largly governed by that idea?

A. No, sir; it is from the appearance of the rock in which this filling is encased and the appearance of the filling itself.

Q. You don't mean by that there could not be a vein in that quartzite in that country?

A. Oh, no; I don't say but what it could exist there if it had been placed there, but I would not expect to find it there
163 in that shape; a mineral bearing vein, as I have told you before in the general acceptation of the term, the metals or ores are precipitated from some kind of solution; that solution will affect the walls more or less, and generally show a cleavage by the action of precipitation on the walls.

Q. As to how veins were filled is a matter of a good deal of discussion—I don't think any of us know.

A. No; I was not there when it was filled.

Q. You don't think a location made on that kind of rock would be valid?

A. I do not.

Q. If the vein was productive of precious metals?

A. I would work it if it produced enough to pay.

Q. How much would you require it to produce in order to call it a mineral vein?

A. In order to know it was a mineral vein, I would have to

know it existed for some considerable distance, otherwise I would think it was a mere surface deposit of precious metals.

Q. Supposing you wanted to work an iron vein—a vein containing 25 or 30 per cent. iron—would you call that a mineral vein or deposit?

A. Yes, sir.

Q. When you meet with a rock of that kind, what do you call it—referring to the sample by Trewick—a wall rock?

A. I would call it a quartzose.

Q. In what respect does quartzose rock differ from quartz rock?

A. It is like quartz rock, but is not real quartz.

Q. In what respect does quartzite differ from quartz?

A. Quartzite is a quartz sand cemented together by heat and pressure, while quartz itself is chrystalized silica.

Q. Is this quartzite?

A. That is quartzite, I presume, but it is considerably chrystalized.

Q. Has that chrystalization taken place before or after the heat you refer to?

A. Probably after, in the process of heat and pressure.

164 Q. Is that the character of rock through which that shaft is driven?

A. Well, not as a general thing. The character of rock through which that shaft is driven is coarser and not so hardly pressed, or so much chrystalized as this. There may be boulders or slabs in it as hard as that, but it is very much shattered and broken up.

Q. How much ground do you think a man could drive through in a day through such ground as that?

A. You mean massive and solid as that?

Q. Yes.

A. If it was massive and solid as that, it would take two men two days to drive a shaft or tunnel a foot probably—where it is massive and solid all across and as hard as that.

Q. Say four by six.

A. No seams or anything of that kind in it to take advantage of it in the way of gouge, it would take that long.

Q. Suppose there is a gash through to work to, working through that kind of rock, how much do you think two men could work out in a day of that kind?

A. Two men could not average more than a foot a day, if they could that much—I am speaking of where the mass is all solid like that clear across, with the exception of a gouge to take advantage of it by blasting.

Q. In other words, that is very hard rock?

A. Yes, sir; that is very hard rock, but that has no characteristic of that shaft, and although there may be slabs in it as hard as that, it is in thin layers.

Q. Is not the rock generally hard, and is not the ease with which it may be worked owing to the fact that it has fissures in it?

A. The rock is not very hard—it is a coarse granular quartzite.
Q. Did you have a hammer or pick when you went in.
A. Yes, sir.
Q. Examined it carefully?
A. Yes, sir: I examined it both top and bottom carefully. I say that piece may have come from that shaft—there may be
165 slabs or small nodules of it like that, but it is very much shattered and broken up. I don't think I saw the impression of a drill in the shaft any where; and don't think they would have to use a drill anywhere in sinking it.
Q. Did you see any indication of a vein at the point called Brockie cut that you referred to?
A. No; I did not.
Q. What is the color of the rock at that point?
A. I did not get to see the bottom of the hole—it was filled up—but the matter that is thrown out, and where I got down and dug into the sides of it, that is quartzy, highly stained with iron on one side and porphyry on the other.
Q. Is not heavily-stained quartz an evidence of a vein wherever you find it?
A. Oh, no, sir.
Q. Is it an indication of a vein?
A. No, sir.
Q. Is not quartz essentially a vein rock?
A. Oh, no.
Q. Quartz?
A. Well, quartz is generally thrown up in veins, but quartz is not necessarily a vein rock.
Q. Is quartz country rock anywhere?
A. I don't know as you would call it country rock—it is generally thrown up in veins or through veins.
Q. If you found heavily stained quartz—iron stained—would not you take that as an indication of a vein anywhere?
A. Well, heavily stained quartz, if it exists in a vein, of course that is an indication of a vein—it is a vein.
Q. But if you find it anywhere, is it not an indication that it came from a vein; in other words, does quartz ever form country rock?
A. You mean chrystalized quartz?
Q. Yes.
A. It is thrown off many times it will cover a large area of ground, and not connected with any vein it is eruptive rock.
166 Q. It never forms country rock anywhere?
A. No, I don't know that it does anywhere.
Q. Don't you take it that it is an indication of a vein if it is vein rock?
A. It is an indication it came from a vein.
Q. Then, if you find quartz heavily iron stained, is it not an indication of a vein somewhere in the vicinity?

A. Oh, yes; if I found quartz heavily stained with iron, I would take it it came from a quartz vein somewhere.

Q. Are there not large quantities of oxide of iron right there at the Brockie cut on the surface?

A. Yes, sir; but no quartz.

Q. Is not it almost universal, that when you find a vein in this country you find iron at the surface—oxide of iron?

A. I cannot say that it is; I believe they generally do find more or less.

Q. Do you know of any mine of any considerable extent that is not accompanied by deposits of iron of greater or less extent?

A. No.

Q. If you find quartz and iron in the vicinity, and you find the country in place, is it not evidence of a vein somewhere in that vicinity?

A. If I found quartz proper, vein quartz, stained with iron, or whether it is stained or not, it is evidence there is a vein somewhere in the vicinity; if I find it laying there by nature, whether it is stained with iron or not.

Q. That you say you saw at the Brockie cut?

A. No, sir; I said quartzite. I thought you misunderstood it. I saw no quartz at the Brockie cut. I saw quartzite on one side and porphyry on the other.

Q. What was between?

A. There is where the heavy stain comes from—on the divide between the quartzite and the porphyry.

Q. What was that filled with—iron?

A. No; they came right together, the quartzite and porphyry—iron stained.

167 Q. You say the country west you never examined much?

A. No; I did not go over it—it is covered with soil, loam, and without stripping you cannot see it. I have been all over the hill, but could see nothing of any outcrop of that seam from the Parleys Park discovery.

Q. You think if that ground was vacant there, now, you would not locate it?

A. No, sir.

L. U. COLBATH, sworn for defendants:

I am acquainted with the Parley's Park and Switzerland claims, and have been a little over four years. I have been a miner about 26 years, and about ten years in Utah. I have examined the Switzerland shaft, the level from it, the Switzerland Tunnel, down through the winze connecting it with the Como, and along the vein and out at the Como Tunnel, and also examined the other work there from the Como Tunnel. There is a mineral vein in the Switzerland shaft and workings connected with it. I examined the Accidental shaft about twelve days ago for the first time. There is a vein in the shaft, and it is sunk on the vein to the depth of 51 feet. I have ex-

amined the Parley's Park discovery shaft several times. It is sunk from top to bottom in shelly quartzite, and the first thirty feet I should call very easy rock to work; it gets harder and closer as depth is attained. I have had experience in sinking shafts and driving tunnels to a considerable extent. It would certainly not take two average miners over five days to sink that shaft fifteen feet. I have observed the first three sets of timbers in it. I should say they were 3½ inches by 5 in the clear. They were roughly got out and not put in the best manner, as they have fallen out since. The cost of that kind of timbering, if the timber was in conveniently near distance, could cost over 75 cents per foot. There is a crevice
168 in the shaft running from the top to the bottom. It is eight inches wide at the top or a trifle more. It closed up quite close after 25 feet, and in the bottom or two feet above the bottom it is three inches. Measured right in the bottom it seems to shut nearly up—an inch and a half say. The crevice contains a filling, but I cannot see any difference between it and the country on either side, except that it is crushed. I may except three or four feet from the surface down that seems to be filled with earthy matter washed in—fine sand and some loam down for a couple of feet. I have examined the shaft all the way down. I do not consider it a mineral vein. I don't think anything appearing in the shaft or at the surface is a mineral discovery.

Cross-examined:

I first examined the shaft in August, 1876, four years ago. The shaft was then open, but I did not go through it—I then got down to the first set of timbers. There would be something less than twenty running feet of timber in one set. We generally buy lagging by the piece, or take poles and split them. That is the kind of lagging that was there, poles split and from small timbers. It would not take a great deal of time to cut and split them. There would not be a cord or two of wood. The lagging wouldn't average two inches thick. The lagging and timbers all piled up would not be near a half a cord. I think any good miner could get out the timbers and have them ready to put in, in a day, if the timber was on the ground or near by, within 200 or 300 feet. It might take the best part of half a day to fit them and put them in. It would not in any event cost more than a dollar per foot to timber the shaft in the way it was done, including everything. There is evidence from the stumps that timber was within 300 or 400 feet in considerable quantities. I think two men would sink the shaft
169 four feet a day, doing nothing but sinking for the first 15 or 20 feet. The filling of the vein with the exception of two or four feet at the top seems to be the same as the country on either side of it, only broken and crushed up, but at the top there is a little earthy matter and some sand and soil washed in. There is no more mineral stain at the top than can be found anywhere in the quartzite that shows a little stain of iron. It is every-

where. This specimen shown to me looks a good deal like a conglomerate and cement; this other propably is vein matter—that is it may be found in a vein, or it may be found in the country, the only mineral I can see present in either is iron. I should judge both contained a little iron. I would not regard that as an indication of a mineral vein, because iron is so generally diffused particularly in that locality that I would not consider it evidence of a vein unless I found it in considerable quantities. It would depend on the condition I found it in, if I found it merely a stain on the surface of the rock I would not consider it evidence of a vein in the vicinity. My definition of a mineral vein is an aggregation of mineral in a fissure. If I found an aggregation of mineral not in a fissure I might call it a deposit or something, owing to the form in which I found it. It would depend on other characteristics whether, if I found a fissure continuing down 20 to 40 feet, indefinite in extent and existing so far as explored and containing ever so small a quantity of mineral, whether I would call it a mineral vein. The mere fact of a vein carrying mineral in small quantities, I should not consider evidence of a mineral vein. It is not impossible to get trace in a country like that for several hundred feet from a mineral vein. I suppose it is possible that mineral may be followed from a trace to a vein, but then there would be other evidences. If a man found a vein eight inches at the surface and carrying a small percentage of silver or gold he might be justified in doing a
170 little work on it. If it still continued to present no other inducement except a little trace at the surface, if he was a miner he would be very apt to quit it.

Q. Are there not a great many mines which look very well at the surface out of which a man cannot make money?

A. If a man can find a trace even in well defined walls, with matter in it differing from the country.

Q. Suppose he found without well defined walls and before he reached walls a rich deposit of ore, without well defined walls, on the contrary the walls were not defined at all?

A. He would follow the ore to its extent.

Q. Would not he be justified in such a case in making a location even without walls?

A. If he found a quantity of mineral, yes.

Q. If he found ever so little?

A. If he found it in place he would be.

Q. If he found it where it had not been placed by mechanical means, would he not be justified in pursuing it and making a location on it?

A. If it was in place, rock in place, he would be.

Q. Is it not very difficult frequently to tell whether rock is in place where nature left it or not?

A. It might have rolled down hill.

Q. Suppose a man should locate on what is called a slide?

A. Then he would follow up the slide on the surface to find where it came from.

Q. Would you claim if a man had located on a slide he had not located on a mineral vein?

A. Yes, certainly, if it was loose, not in place, it would not be a mineral vein.

Q. Suppose the top of a very rich vein should slide off, very rich, have thousands of dollars in it and a man should locate on it, do you say that such a location as that would not hold?

A. It might hold what came underneath the surface. It would not be a vein. He could make a surface location and hold
171 something there but he would not hold a vein if it was from from above anywhere, unless he got title to it in some way.

Q. My question was whether you would consider that a location which a miner might hold—could he make a location on it?

A. No, sir, not for a vein or lode.

Q. You don't think if a rich deposit of that kind should be found which had slid off a rich vein and a miner should locate on it that he could hold it?

A. In that condition he would not be justified in making a mineral location for a vein.

Q. Why?

A. Because it is not within the meaning of the act, there is no location of a vein or lode.

Q. I will give you a little authority. Judge Field defines a vein or lode to be something a miner will follow in pursuit of ore. When a miner finds a slide which he is willing to spend money on, and, in fact, is worth money, is not that sufficient to locate on? I am not speaking of float, mere scattered ore, I am speaking of a slide where the whole body has slid together in mass.

A. No; I think Judge Fields' decision there defining the term defines the vein also, and there would be no vein in a slide.

Q. He says it is anything a miner would pursue with the expectation of finding ore. If it was rich he would be likely to pursue it?

A. A man would be in the expectation of finding ore if he followed up a float up side of the mountain, but he would not be justified in making a location.

Q. Would not that come within the definition then?

A. No, I think not.

Q. Why not?

A. Because at the same time he defines a mineral lode or vein.

Q. Yes, and defines it to be what a miner would follw?

A. Yes, and so the two must be connected, must go together.

172 Q. Now, it would be necessary in doing that work to have a windlass, would it not?

A. Yes, for the last seven or eight feet.

Q. About how deep can a shaft be sunk without a windlass?

A. I have seen them sunk ten feet, but usually at seven feet they put a windlass in.

Q. How much would a good safe windlass be worth?

A. A good safe windlass for sinking to a depth of forty feet would be worth ten dollars, say.

Q. Now, for the purpose of working in that hard rock where you say there was no blasting necessary, but picking and gadding, crowbars and that sort of tools would be necessary? About how much would have to be expended for tools?

A. If tools were bought for every little hole that is sunk in the country, of course that would be an expense.

Q. If a man did not have them he would have to get them?

A. He would not wear them out sinking a hole of that kind, we would only count the wear and tear of the tools.

Q. About how much would the necessary tools cost?

A. For two men to work they ought to have at least three or four picks, get along very well with three in that rock, and a shovel. The picks would cost about $2.50 handled; a shovel costs a dollar and a half. If you wore them out it would be only ten dollars worth of tools.

Q. They would have to have some gads?

A. They would take a little steel, a few pounds of steel, a couple of dollars worth would be as much as they would want to use and have it left when they got through. The wear and tear on that kind of work is all that we usually count for tools, something for sharpening. If the steel is worn out they have to re-steel, then they are just the same as new.

Q. What would a sledge cost?

A. Say an eight pound hammer would cost three dollars, handled and everything—something like that.

173 Q. Are you not aware that tools along in '72, '73 and '74 were higher than they are now?

A. A little higher.

Q. The tools, such as were necessary, picks, shovels, gads, sledge and crowbar—what would they cost, what would the outfit be worth?

A. You can buy the necessary tools to sink a shaft of that kind as I say for seventeen or eighteen dollars, everything that you would want and then it would hardly dull the points going down the fifteen feet.

Re-direct:

Q. What would be your estimate of the wear and tear of the windlass and tools used to sink fifteen feet?

A. In wear and tear we would count sharpening. It might be a dollar a day for two men, sharpening, coal, and the wear and tear; that would be a liberal estimate.

Q. As to the windlass.

A. There would not be any, there ought not be any wear and tear upon the windlass for that amount of work.

W. J. SNYDER, recalled for defendants:

When I was at the Parleys Park shaft in July or August, 1874, there was a windlass on it which I should judge was worth about five or seven dollars. I observed it. It was a rough concern and not worth much.

Cross-examined:

I made about the same kind of a one myself the same year. That was my first and only experience in the windlass business. I judge of the value of that by comparing it with mine.

Deed from Cassady to Chambers for the Accidental mining claim, put in evidence by defendants, and marked Defendants Exhibit 10.

Defendants rest.

JAMES CLARK, recalled for plaintiffs:

I had assays made of the mineral matter I took from the
174 vein in the Parleys Park shaft—the first by Meader, the last by Mr. Hodges.

Plaintiffs' counsel here offered to prove by this and other witnesses that fair samples were taken from the matter in the vein in the Parleys Park shaft and assayed, and to show what the assays show the samples contained. Defendants' counsel objected to the evidence as not rebutting. The objection was sustained, and plaintiffs, by counsel, excepted.

WM. A. HODGES, sworn for plaintiffs:

I am an assayer and reside in Salt Lake City. I have been in the business nine years. I made a correct assay of mineral placed in my hands by Mr. Clark, the witness last on the stand, and gave this certificate of it. At times there are differences in assays made by different assayers. If you are assaying for silver the differences depend on the amount of the silver in the ore. I have known variations here of 40, 50, and 60 ounces between different assayers. I have also known differences by escape, and by assayers not taking into account the silver in the litharge used in making the assay. I take that into account, and it is necessary to do so. All assayers should test every first lot of litharge they receive and find the contents in silver, otherwise they are liable to error, especially in samples containing a very small amount of silver. There are other sources of error in improperly fluxing the ores. If there is a large amount of silver in ore and you don't take the precaution to thoroughly oxidize the sulphur in the ore you would be liable to error, because the sulphur carries off the silver into the slag that is formed. In cupelling, if you drive the assay too hot you lose some silver, and you lose some anyway by cupelling, but where the amount of silver is small, the loss is very small compared to the amount there.

The larger the bulk of course the greater the percentage of
175 loss. Frequently assays are made for silver and gold, and none returned, when a careful assay would return both. In the assays in this certificate I used ordinary care.

Plaintiffs offer in evidence the certificate of assay. Objected to by defendants' counsel as not rebuttal. Objection sustained and plaintiffs except.

An assay is not correct where litharge is used, which shows no result. No assayer uses litharge that carries no silver.

JOHN SHEHAN, sworn for plaintiffs:

The evidence offered by this witness was held not to be in rebuttal and ruled out.

JAMES MOREY, sworn for plaintiffs:

At the time I worked in the Parleys Park shaft in 1874 there was one man hoisting and one working in the shaft. I worked as hard as I knew how and we made about a foot a shift. That is all anybody else could do. I might have made an inch or two more, but I count if I done a foot I did a pretty good day's work. I mean a foot in ten hours from night till morning. It was at night I worked there.

JAMES CLARK, recalled for plaintiffs:

Two miners might sink that Parleys Park shaft a foot or two feet in a shift as I see it now. The difficulties at the time it was sunk might have been greater than at present.

JAMES A. COULLARD:

In sinking the Parleys Park shaft I believe two men could make a foot or a foot and a half a day. I should not think more than that with the timbering.

Case closed.

October 5th, 1880.

Mr. BENNETT: It may be minuted that the suit of the Como Tun-
176 nel, whoever the parties are, against the Parleys Park claimants, is dismissed, and the suit of the Parleys Park claimants against the Harry Rickard claim, the Ontario extension No. 1, the defendants withdraw their answer.

Judge SUTHERLAND: We offer the testimony in regard to samples and assays which was offered as rebutting evidence when the parties separated, now, in defense of their case, they being plaintiffs in the cross-suit and we defendants. We told Mr. Bennett over a week ago that we should offer this testimony.

Mr. BENNETT: Just a week ago to-day.

Judge SUTHERLAND: We desire to offer the assays which we had identified before and some made since, in which we required extraordinary care in assaying.

Objected to as not rebuttal, incompetent, and inadmissable, the two cross-suits having been submitted on the testimony already taken.

The REFEREE: The question of rebuttal I have no hesitation about, whether right or wrong, it seems to me it is not the description of the evidence as to the classes of the witnesses or who they are, but the character of the testimony that is given that determines whether it is rebuttal or not. If this evidence is properly in rebuttal, then if the plaintiff had chosen to put in no testimony as to his discovery, only of assays, leaving out all question of the testimony of witnesses as to their opinion as to whether or not there was a discovery of mineral vein, and the defendant had brought evidence of that character to repel the evidence of the plaintiff, then they would have been entitled, on the same principle to have brought witnesses for the first time to show they had a mineral discovery, and so it seems to me the argument proves very far too much. The other grounds I have some difficulty upon. I conceive that under the stipulation, if it was in force—and it is not suggested it was not, nor any reason given why
177 it is not—that would make evidence in either of the cases applicable to all of them, or make it operate as being introduced in all, so far as applicable. That the parties ought to have the benefit of, unless they have waived the benefit of that by something subsequent. Now I think it is clear by the terms of this stipulation that all the testimony that should be introduced on this hearing should be considered as introduced in each of the several cases which were submitted, so far as applicable. And it seems to me the strongest ground that is suggested here in favor of the admission of this testimony, is the fact that by the dismissal of one of these cases, upon which it was understood further testimony would be introduced at the time we took the adjournment, and the withdrawal of the answer in the other, thus precluding testimony from being introduced in those cases, that it might be claimed with a good deal of reason that a party might be prejudiced from that circumstance, by reason of this stipulation. I do not remember exactly what counsel did say with reference to the submission of the cases or whether there was any reservation by reason of this stipulation, but I did not understand there was any reservation. My distinct remembrance was that as to the two cases, the cross-suits between the Parley's Park and Switzerland claims, the parties rested those cases, closed them. It seems to me that was repeated in various ways so that there could be no mistake as to what the counsel intended with reference to those two cases, and even an estimate was made of the time it would probably occupy the referee in taking the testimony in the other two cases. Now, under this stipulation, if the other two cases were to be submitted and testimony introduced upon them, there is no sort of doubt but what, if applicable, it would be considered, under this stipulation in the two cases

already submitted, and according to my distinct remembrance,
178 counsel did submit those cases without reserving any rights as to these cases.

Judge SUTHERLAND: I want your honor to understand that my recollection is entirely different as to that. I read that stipulation and said we have a right to the benefit of any testimony taken in those two cases.

Mr. BENNETT: Judge Sutherland, will you say that you omitted to put in those assays relying upon that stipulation?

Judge SUTHERLAND: I will say this, that I made that remark, excepting the right we have under that stipulation with special reference to putting in these assays.

Mr. BENNETT: But it was after you had omitted to put in your testimony and been overruled on the offer of it in rebuttal.

Judge SUTHERLAND: I made the remark, we do not submit these two cases on the testimony already introduced, because by this stipulation, any testimony that comes in hereafter we will be entitled to have the benefit of in these two cases, and I made the reservation with special reference to putting in these assays.

The REFEREE: I do not remember that there was any such reservation as that, but there was this statement: That any testimony taken in these cases which was applicable to those should be considered in them. That was merely to have an understanding as to the force of the stipulation as to what testimony should come in.

Judge SUTHERLAND: I had that stipulation in my mind when that testimony was offered in rebuttal, and I refrained from any part in that argument for the reason that I saw the way open to introduce that testimony in these other cases.

179 The REFEREE. There being a question about it, and I would not be positive, but still my memory is pretty distinct; I concede that as counsel view there is something that appeals strongly to the court, and yet if there was no question at all about my being right as to my understanding, the misfortune of counsel, I believe, in these sort of things is not to be considered. It may be harsh, but if the parties do not reserve the right to introduce testimony in other cases, they might be dismissed, but that character of testimony which, under the stipulation here, would be considered if that testimony should be introduced in any issue presented by those cases as to the discovery, then by virtue of this stipulation, and only by virtue of this stipulation, you would have a right to have it considered.

Judge McBRIDE. If I had known or believed that the court would have ruled out assays in response to their assays, I would have introduced them in the first instance, but I was surprised at the ruling of the court.

The REFEREE. And I was surprised at the course taken by counsel.

Mr. BENNETT. I will agree to permit the referee to name three reputable persons, to go there and take samples and let the sam-

ples be samples in the case at the suggestion of the referee, those samples shall be brought in and assayed, and stand as the samples in the case. I will go that far, but I do not like to submit to a months running by, and samples taken by Tom, Dick and Harry, and be brought in here with the assays.

Judge McBRIDE. I will state that at the time this testimony was introduced I did suppose that we had a right to introduce these assays. I had no question about it in my mind, and although we had these assays at that time, although I had them in my pocket,
180 I did not propose to introduce them unless assays should be introduced on the other side, and then I supposed we would be entitled to them. I say the reason why those assays were not introduced in the first place was my mistake; my misapprehension of the judgment of the court upon that. I consulted with my associate about that and advised it. As to the offer counsel makes, if it had come earlier in the case, we would have been willing; but in as much as we have assays now, we wish to have them introduced. We do not reject his offer, but we do not accept it as a substitute for the offer which we make.

Mr. BENNETT. I make it as a substitute for your offer.

The REFEREE. I remember distinctly a conversation that was of the nature that gentlemen relate, but I do not remember it in that way, and yet there were matters outside of what the record discloses, I remember that distinctly, and I am induced, out of entertaining some doubt, merely as to the fact of counsel not agreeing with it, and putting matters I do remember, outside of the minute of the reporter with it, to permit counsel to introduce this testimony, and I do it for the reason that, if as counsel claim, they submitted conditionally—although I did not understand it, yet remarks of that character were made—I am clear that if that sort of proof is admissable in those cases then they would have a right to have it considered in these that have been submitted, and they may introduce the proof.

Mr. BENNETT. Now let us understand—shall it be considered as introduced in those cases?

Judge SUTHERLAND. Those cases not being in a situation to be tried, one case is discontinued and the answer withdrawn in the other, and the opportunity we had to introduce testimony in those cases is gone.

181 The REFEREE: I would not exercise any discretion in reopening these cases. Though there may be an apparent awkwardness in introducing testimony in cases, one of which is dismissed and in the other the answer is withdrawn, yet the effect the testimony ought to have in these should be by being introduced in those, because it is only by reason of the stipulation that I am induced to allow it to come in.

Judge SUTHERLAND: You have taken away the occasion to introduce it in those cases—you allow us to introduce it in the two cases where it is important.

The REFEREE: That you should have no opportunity to introduce proof in those cases, under those circumstances, by reason of those cases not having been submitted, and this stipulation making it affect these cases that have been submitted, it seems to me it must follow necessarily that if this testimony is introduced——

Judge SUTHERLAND: It should be introduced in all the cases.

The REFEREE: It would not be applicable, perhaps, in all the cases. That which is not applicable to one case could not be considered as in it. No particular testimony could be considered as introduced in all the cases unless it was applicable in all the cases; but under these circumstances it seems to me that if it is introduced on that basis, so that you can have the benefit of it under this stipulation, the other parties would doubtless have a right to be heard on that point, too. It seems to me on first impression, so far as that right is concerned, it must be introduced subject to that right of the other parties, if they desire to exercise it.

Mr. BENNETT: We certainly do, and I now renew my offer, to send any reputable men that the Referee may select to take samples and have assays made.

182 Judge SUTHERLAND: We accept the offer, but we wish to introduce our proof. We will offer that in addition.

Mr. BENNETT: I offer it as a substitute.

Judge MCBRIDE: First we will offer the certificate of assay that was identified by Mr. Clark and Mr. Hodges, dated May 19, 1880, marked Exhibit "L."

(Same objection as before. Overruled and defendants except. Certificate read in evidence.)

JOSEPH A. COULLARD, recalled for plaintiffs:

Since the adjournment I have taken samples from the old Parleys Park shaft; I took them October 1st; I took the samples by measurement from the bottom of the shaft up. No. 2 I took across the vein 24 feet from the bottom of the shaft; No. 3, 14 feet from the bottom of the shaft—also across the vein, the same way I did No. 1, which was taken two feet from the bottom of the shaft on the west side. I took my samples, then took my tape line and measured to where I took them. I kept the samples in my possession, until I delivered some of them to Mr. Foote and the balance to Mr. Hodges. I took the samples at the request of Judge Sutherland. I took some samples of quartz from the vein, and delivered one to Frank Foote.

MATT. M. MORRISSY, sworn for plaintiffs, says:

I live in Park City, and know the discovery shaft of the Parleys Park claim. I took some samples from the shaft last Saturday at the request of Mr. Coullard. I took one 18 feet from the bottom

and one 36 feet from the bottom. I took them across the vein, and had them assayed by Frank Foote. I kept them in my possession until I had them assayed. This is the certificate that I got.

EDWARD BRIM, sworn for plaintiffs, says:

183 I have followed mining for the last seven or eight years. I took samples from the discovery shaft of the Parleys Park mine last Saturday at Mr. Coullard's request. The first two samples were about three feet from the bottom; the next two were 21 and 25 feet from the bottom. I gave two to Mr. Foote and three to Mr. Hodges to be assayed. This is Mr. Foote's certificate and here is also Mr. Hodges'. I took them out of the vein, and was very particular to scratch off the face where I took them to satisfy myself that I got it square. No suggestions were made to me where I should take them.

EDWARD A. SHEAR, sworn for plaintiffs, says:

About ten days ago I took samples from the Parleys Park discovery shaft at Mr. Coullard's request. I took some from the bottom, from both sides of the shaft across the vein; then went up 25 feet and took another across the vein; the third I took 40 feet from the bottom on both sides of the shaft and three or four feet from the top. I gave No. 1 and No. 3, these were from the bottom and top, to Mr. Hodges, and No. 2 I gave to Mr. Foote. I got certificates of the assays. These are the certificates. The samples were from the vein. I picked off the outside, then took them across the ledge on both sides of the shaft.

FRANK FOOTE recalled for plaintiffs:

I made the assays exhibited and received the samples from the persons named in the certificates. The assays are correct. Some of the samples handed to me contained quartz, and it was vein quartz.

W. A. HODGES recalled for plaintiffs:

I made these assays. They are correct, and I received the samples from the persons named in the certificates. The greater part of the samples contained quartz, which I should judge was vein quartz, though I don't know much about veins or mining.

184 Certificates of assay offered in evidence objected to by defendants as incompetent as rebuttal, and for the same reasons previously stated.

(Objection overruled, and defendants excepted.)

Certificates from "E" to "K," inclusive, read in evidence.

Defendant's counsel then moved to strike out all the evidence in regard to samples, assays, and certificates thereof, taken as rebuttal evidence on the part of plaintiffs, on the ground that there is no issue pending on which the same is proper evidence.

(Motion overruled, and defendants excepted.)

Exhibits referred to in the foregoing testimony:

PLAINTIFF'S EXHIBIT "A."

Notice of the Parley's Park Lode.

We, the undersigned, do hereby claim and locate fifteen hundred (1,500) feet on this ledge, with all dips, spurs, and angles, and one hundred (100) feet on each side of the ledge along the course of the mineral, cor ncing at this notice or monument and running seven hundred and fifty (750) feet each way on the ledge.

The above is according to the mining laws of the United States Congress and the local mining laws of Uintah District, to be known as the Parleys Park Ledge.

Uintah Mining District, Summit county, Utah Territory, July 19th, 1872.

ROBT. PAXTON, - - - -	750 feet.
C. C. PERKINS, - - - -	375 feet.
JAMES HARRINGTON, -	375 feet.

Situated on Ontario Hill, about 200 feet more or less north-
185 east of Ontario mine, running parallel with Ontario ledge, in Uintah Mining District, Utah Territory.

Filed for record August 9th, 1872, at 8 o'clock, A. M.

JOSEPH H. BLACK,
Recorder of the Uintah Mining District.

(Copy duly certified.)

Notice of the Ontario Lode.

We, the undersigned, claim for mining purposes (1,500) fifteen hundred feet on this lead, lode, or deposit of mineral. We claim seven hundred and fifty feet northwesterly, and seven hundred and fifty feet southeasterly from this notice and monument, and one hundred feet on each side of the ledge, with all the privileges granted to us by the United States mining laws and the local laws of this district. We claim all dips, spurs, angles, and variations. Situated on the Ontario Hill, about one-fourth of a mile from the Lake, and opposite the Steam Spring, about seventy-five or one hundred feet from the creek bed, easterly.

Uintah Mining District, located July 15th, 1872.

HERMAN BUDEN, - -	550 feet.
JAMES H. KANE, - -	550 feet.
RECTOR STEEN, - -	200 feet.
AUGUSTUS DOWELL, -	200 feet.

Filed for record July 16th, 1872, at 15 minutes to 3 o'clock p. m. I have examined the above location and find it does not infringe on the rights of any previous location.

JOSEPH H. BLACK,
District Recorder.

(Copy duly certified.)

EXHIBIT "B."

Certificate of assay of sample taken by the witness Morey,
186 from the west end, showing 1 6-10 ozs. silver; 160-1000 ozs. gold; value of silver, $2.07; value of gold, $3.31; total value, $5.38; per cent. iron, 37 6-10.

EXHIBIT "C."

Plaintiff's' map.

EXHIBIT No. "1."

Extracts from the By-Laws of Uintah Mining District.

Article IV.

It shall be the duty of the recorder to keep in a suitable book or books, a full and truthful record of the proceedings of all miner's meetings in this district, of which he shall be Secretary when present, and also keep a suitable book or books for recording claims and transfers, in the order of their date as per original notice.

He shall keep his books open for the inspection of all persons interested, at reasonable hours, Sundays excepted, but only in his presence or that of his deputy, whom he shall have power to appoint, and whose appointment shall be entered at large on the record prior to his acting as such, and for whose official acts he shall be responsible.

It shall also be his duty to deliver to his successor in office all books, records, and papers belonging to the office.

Article VIII.

When a notice of location is presented to the recorder for filing and recording he shall note on the back of the notice the time of presentation, day and hour, and such instrument shall be deemed recorded from and after the time of filing and presentation; pro-
187 vided, however, that he shall first examine whether a prior claim does exist on said location, whose term has not expired by the limitation fixed; and if such prior location is in existence he shall so inform the party presenting the notice, protest and refuse to record the same, and in case the party insists on the record, then the recorder shall, in precise terms, state in writing on the record the reason why he protested and refused the record, and that the record is only made on the special demand of the party, and the recorder shall make an exact copy of the remarks he made on the record, on the notice presented.

DEFENDANTS EXHIBIT No. "2."

Notice of the Switzerland Lode.

We, the undersigned, claim fifteen hundred (1,500) feet on this lead, lode, or ledge, or deposit of mineral bearing rock or earth therein: we claim 140 feet northwesterly to the Ontario line, and we

claim 1,360 feet southeasterly from this notice and monument with 100 feet on each side of the vein for working purposes; we claim all the rights and privileges guaranteed to us by the mining laws of the United States and the local laws of this district.

This location is situated 140 feet southeasterly of the southeasterly boundary line of the Ontario patent line stakes in Uintah Mining District.

Located Oct. 3d, 1874.

JAMES CAIN, - - 800 feet.
MIKE HEFFRON, - 500 feet.
JOHN CAMMERMAN, 200 feet.

Filed for record Oct. 5th, 1874, at 4 o'clock p. m.

188 I have examined the above location and find a number of holes around it but are abandoned, as the locators have failed to comply with the mining laws of the United States, otherwise it does not infringe on the rights of any previous locators.

J. H. BLACK,
District Recorder.

(Copy duly certified.)

EXHIBIT "3."

Defendants' map.

EXHIBIT "4."

Location Notice of Accidental Mine.

Whereas the Parleys Park mining claim in Uintah Mining District, Summit county, and Blue Ledge Mining District, Wasatch county, Utah, has been and is forfeited for want of work and improvements, no work having been done or improvements made thereon for the year commencing July 19th, 1878, and ending July 19th, 1879. Now, therefore, I, Thomas Cassady, hereby claim and locate all that part and fraction of said Parleys Park mining claim described as follows, to wit: Commencing at post No. 1 of said claim according to the survey thereof heretofore made and now on file in the office of the United States surveyor general for Utah, at Salt Lake City, running thence south 25° 28′ west 200 feet to post No. 2 of said survey; thence north 74° 2′ west five hundred and eighty-eight feet to post No. 3 of said survey; thence north 11° east two hundred feet, and thence south 74° 2′
189 east to the place of beginning. I have this day set posts at each corner of this re-location as above described, thus distinctly marking it on the ground so that its boundaries can be readily traced. The location or initial point of this claim is at a point about twenty feet easterly from the discovery point of the Switzerland mining claim—a permanent monument—at which point

this notice is posted. I call and hereby name this claim, "Accidental mine."

Located this thirteenth day of September, A. D. 1879, in Uintah Mining District, Summit county, and Blue Ledge Mining District, Wasatch county, Utah.

THOMAS CASSADY.

Filed for record September 15th, 1879, at 10 o'clock a. m.
(Copy duly certified.)

EXHIBIT "5."

J. McVicker's Certificate of Assays of Samples Left by Ellsworth Daggett, dated August 25, 1880.

Marked.	*Ounces of Silver to 2,000 Lbs.*	*Ounces of Gold to 2,000 Lbs.*
Ontario, lot A	None.	None.
" B	"	"
" C	"	"
" D	"	"
" E	"	"
" F	"	"
Find them of no value in gold or silver.		
Ontario, No. 6	2.62	

EXHIBIT "6."

J. McVicker's Assay of Samples left by Wm. McQueen, dated September 30, 1880.

Marked.	*Ounces of Silver to 2,000 Lbs.*
Ontario Tracings, H	26.24

190 EXHIBIT "7."

Certificate of Assay of Samples for Colbath & James.

Marked.	*Ounces of Silver to 2,000 Lbs.*	*Ounces of Gold to 2,000 Lbs.*
Sample No. 1	None.	None.
" 2	17.49	"
" 3	18.95	"
" 4	20.41	"
" 5	64.16	"
" 6	21.87	"
" 7	None.	"

EXHIBIT "8."

Samples Assayed by J. Mc Vicker for Jas. E. Matthews.

Marked.	*Ounces of Silver to 2,000 Lbs.*	*Ounces of Gold to 2,000 Lbs.*
Ontario No. 1	10.20	None.
" 2	1.45	"
" 3	None.	"
" 4	1.02	"
" 5	1.16	"
" 7	2.91	"
" 8	2.04	"
" 12	2.33	"
" 13	2.62	"
" 14	2.91	"

EXHIBIT No. "9."

Certificate of Assays by J. Mc Vickers for L. U. Colbath.

Marked.	*Ounces of Silver to 2,000 Lbs.*	*Ounces of Gold to 2,000 Lbs.*
Top sample No. 1	None.	None.
Middle " 2	"	"
Bottom " 3	"	"

Find them of no value.

EXHIBIT "10."

Deed from Thomas Cassady to Robert C. Chambers of the Accidental mining claim, dated Sept. 19, 1879. Recorded Sept. 24, 1879.

191 Plantiffs' exhibits put in as part of rebuttal evidence.

EXHIBIT "E."

Certificate of Assay by Frank Foote of Samples for M. M. Morrisey, dated Oct. 5th, 1880.

Sample No. 1. Bottom of shaft shows no silver or gold and 4 $\frac{85}{100}$ per cent. of iron.

Sample No. 3. Thirty-six feet from bottom, east and west sides, shows no silver or gold, and 4 $\frac{85}{100}$ per cent. of iron.

EXHIBIT "F."

Certificate of Assays by Frank Foote for Jos. Coullard, dated Oct. 5th, 1880.

Sample No. 1. Two feet from bottom, west, shows $\frac{29}{100}$ of an ounce of silver, value 37 cents, and 3 $\frac{3}{100}$ per cent of iron.

Quartz sample. No silver or gold, and 4.36 per cent. of iron.

Croppings. No silver or gold, and 9 $\frac{8}{100}$ per cent of iron.

EXHIBIT "G."

Assay of Sample for Mr. Shear, Oct. 5, 1880, by Frank Foote.

Sample No. 2. 25 feet from bottom of the shaft shows no silver or gold, and 6 $\frac{81}{100}$ per cent. iron.

EXHIBIT "H."

Assay of Samples for E. A. Shear by W. A. Hodges, dated Oct. 5, 1880.

Sample No. 3. 40 feet from bottom of shaft shows $\frac{14}{100}$ of an ounce of silver.

Sample No. 1. Two feet from bottom of shaft shows 1 $\frac{31}{100}$ ounces of silver.

192 EXHIBIT "I."

Assay of Samples for J. A. Coullard by W. A. Hodges, dated Oct. 5, 1880.

Sample No. 2. 24 feet from bottom, east, shows $\frac{43}{100}$ of an ounce of silver; sample 14 feet from bottom shows same.

Sample No. 3. 5 feet from surface, east, shows $\frac{58}{100}$ of an ounce of silver.

EXHIBIT "J."

Assays by Frank Foote of Samples for Mr. Brimm, dated Oct. 5, 1880.

No. 3. 21 feet from bottom of slope, east side, shows no silver or gold, and 1 $\frac{55}{100}$ per cent. of iron.

No. 4. 25 feet from bottom of shaft, west side, shows $\frac{87}{100}$ of an ounce of silver, trace of gold; total value $1.13, and 4 $\frac{64}{100}$ per cent. of iron.

EXHIBIT "K."

Assays by W. A. Hodges of Samples of Mr. Brimm, dated Oct. 4, 1880.

No. 1. 3 feet from bottom of shaft, $\frac{58}{100}$ of an ounce of silver.
No. 2. From same place; no silver.
No. 3. From croppings; no silver.

EXHIBIT "L."

Certificate of an Assay of Samples for Mr. Kennedy by W. A. Hodges, dated May 19, 1880.

No.	1.	Shows	1.02	ounces	silver,	trace of gold.
"	2.	"	87-100	"	"	"
"	3.	"	72-100	"	"	"
"	4.	"	87-100	"	"	"
"	5.	"	87-100	"	"	"

The foregoing is all the evidence introduced by the parties on the

trial, except plaintiffs' map, Exhibit "C," and defendants' map, Exhibit "3."

193 And the defendants as part of this statement, specify the following particulars in which the evidence is insufficient to justify the findings and decision of the referee, to wit:

First. The evidence is insufficient to justify the first finding of fact, and particularly that part of said finding that declares the locators of the Parleys Park claim discovered, at the discovery point thereof, a mineral bearing vein or lode, and such finding is against evidence.

Second. The evidence is insufficient to justify the third finding of fact that prior to July 24, 1874, and within a year preceding that time the owners of the Parleys Park claim performed labor and made improvements thereon of one hundred dollars in value, and such finding is contrary to evidence.

Third. The evidence is insufficient to justify the fifth finding of fact, and particularly those parts thereof which find that the said "Main Shaft" is in such proximity to said Parleys Park mining claim that work in it had a tendency to devolop said claim, and said shaft was located and intended for the purpose of developing said claim and the Lady of the Lake and Central claims.

And the defendants specify the following as errors in law occurring at the trial, and only excepted to by them, and on which they will rely, to wit:

First. The Referee erred in overruling defendants' objection to the witness Jas. M. Kennelly stating what James Cain and others said to him as to the comparative validity of the Switzerland and Extension No. 1 Ontario mining claims.

Second. Also in overruling defendants' objections to the testimony of the witness Benj. W. Morgan, and permitting him to testify concerning the location of the Lady of the Lake main

194 shaft, its objeet, and to doing work thereon as and for work on the Parleys Park claim, and in overruling defendants' motion to strike out all evidence admitted concerning said shaft and work done thereon.

Third. Also in overruling defendants' objections, and permitting the witnesses Joseph M. Locke, Nicholas Trewick, Wm. A Stanton, and others, to testify that at the Parleys Park discovery shaft there was such a vein or indication as a miner would be likely to follow with a reasonable expectation of finding ore; and in permitting witnesses to testify there was such a vein as a miner would locate and in permitting witnesses to answer questions in various forms that the vein there was one a miner would locate and follow.

Fourth. In permitting witnesses, Wm. A. Stanton and others, to testify against defendants' objection to mineral indications at points on the Parleys Park claim other than the discovery point.

Fifth. In overruling defendants' objection and permitting the witness Richard Grant to testify how the indications of the Parleys

Park vein as to ore at the surface compared with other mines in the district.

Sixth. In sustaining plaintiffs' objection and not permitting the witness James McBride to testify to the value of sinking, timbering, and lagging the Parleys Park shaft to the depth of fifteen feet.

Seventh. In sustaining plaintiffs' objection and not permitting the witness Tim Sullivan to testify what it was worth to put in two sets of timbers and two lengths of lagging from the top.

Eighth. In sustaining plaintiffs' objection and not permitting the witness James McGown to testify to the value of sinking the Parleys Park discovery shaft fifteen feet.

Ninth. In overruling defendant's objection to the reception of assays in evidence as rebutting evidence, and in admitting
195 in evidence plaintiffs' Exhibits "E" to "L" inclusive, and the evidence of the witnesses Coullard, Morrissy, Brimm, Shear, and Foote concerning the samples and the assays shown by those exhibits, and in overruling defendants' motion to strike out all such evidence.

Tenth. The Referee erred in finding as a conclusion of law that the plaintiffs at the commencement of the action owned the Parleys Park mining claim, and that the same was and is a valid claim embracing the premises described in the complaint, and that it is now owned by the Parleys Park Silver Mining Company by title derived from the plaintiffs pending the action.

Eleventh. The Referee erred in finding as a conclusion of law that the defendants have no title or interest in said premises, and had none at the commencement of the action.

Twelfth. The Referee erred in making the third finding and conclusion of law, and in finding the plaintiffs were entitled to judgment as therein set forth.

Thirteenth. The Referee erred in not finding, as matter of law, that the Parleys Park claim was forfeited for want of work and improvements from July 19th, 1878, to September 15th, 1879, and the Accidental location therefore valid.

Dated Nov. 29th, 1880.

BENNETT & HARKNESS, *Att'y's for Defendants.*

The foregoing statement has been agreed to, and is full, true, and correct, and it may be used by either party as a statement on appeal, as well as on motion for a new trial without further service or settlement. The maps, Exhibits "C" and "3," to be deemed part thereof without annexing. Time for making statement on
196 appeal has been extended by stipulation to a time beyond this date.

Dated Dec. 17th, 1880.

SUTHERLAND & McBRIDE,
Att'ys for Plaintiffs.
BENNETT & HARKNESS,
Atty's for Defendants.

ORDER OVERRULING MOTION FOR NEW TRIAL.

[Title of Court and Cause.]

Now, on this day, comes on the motion for new trial on the statement heretofore filed and the record in this cause, and the errors assigned, and the case was submitted without argument by the counsel for the motion, and thereupon it appearing to the court that there is no error in this cause sufficient to reverse the findings of the Referee, it is ordered that the said motion be, and the same is overruled; to which ruling the counsel for defendants excepts.

January 3d, 1881.

JOHN A. HUNTER, *Judge.*

The foregoing, consisting of 196 pages of printed matter, is a full, true, and correct transcript of the record herein, except maps "C" and "3," which may be used without annexing. Time to file transcript has been extended to this date, May 27, 1881.

SUTHERLAND & McBRIDE,
Att'ys for Resp'd'ts.
BENNETT & HARKNESS,
Atty's for App'l'ts.

Here follow two maps, marked pages 197 and 198.

199 Afterwards, at a term of said supreme court, begun and held at Salt Lake City, in Utah Territory, on the 6th day of June, A. D. 1881, proceedings were had in said court and cause and entered on the records of said court as follows, to wit:

WEDNESDAY, *June 15th*, A. D. 1881.

JAMES HARRINGTON *et al.*, Respondents,
vs.
ROBERT C. CHAMBERS *et al.*, Appellants.

From 3d Dist.

This cause coming on regularly for hearing, was argued by R. Harkness, Esq., for appellants, Messrs. Sutherland & McBride for respondents; submitted and taken under advisement.

Also—

SATURDAY, *July 23d*, A. D. 1881.

JAMES HARRINGTON *et al.*, Respondents,
vs.
ROBERT C. CHAMBERS *et al.*, Appellants.

From 3d Dist.

This cause having been heretofore argued and submitted,
200 and the court being sufficiently advised therein, it is now here ordered and adjudged, his honor Judge Twiss dissenting, that the judgment of the district court therein be, and the

same is hereby, affirmed; and further, that respondents have and recover of and from appellants the sum of sixteen dollars costs.

Whereupon an appeal to the Supreme Court of the United States from the judgment of this court in this cause was prayed by said appellants, by their counsel, and allowed, counsel for respondents being present; and the amount of the bond to be given on such appeal is hereby fixed at $200.

Also on same day last aforesaid—

JAMES HARRINGTON *et al.*, Respondents,
vs.
ROBERT C. CHAMBERS *et al.*, Appellants.

From 3d Dist.

The appellants herein having prayed an appeal from the
201 decision of this court to the Supreme Court of the United States, the following findings are adopted and made, to wit:

First. The findings of fact and conclusions of law made by the referee are approved and adopted as the findings of this court.

Second. The maps marked Exhibits "C" and "3," and used on the trial, and being part of the statement, are annexed to and made a part of the findings of this court.

202 Afterwards, on the 30th day of July, A. D. 1881, there was filed in the office of the clerk of the supreme court of said Territory of Utah a supersedeas bond, a bond to the clerk of the United States Supreme Court, and a stipulation waiving citation and agreeing on value of property in controversy, all in said cause, copies of which follow, to wit:

Know all men by these presents, that we, Robert C. Chambers, John E. Dooley, and Thos. R. Jones, all of Salt Lake City, Utah Territory, are held and firmly bound unto James Harrington, George Goss, Ezra Rust, Andrew Hay, James J. O'Reilly, Joseph Gorlinski, and Jabez G. Sutherland, their heirs, executors, administrators, and assigns, in the full and just sum of two hundred dollars, to be paid to the said James Harrington, George Goss, Ezra Rust, Andrew Hay, James J. O'Reilly, Joseph Gorlinski,
203 and Jabez G. Sutherland, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 29th day of July, A. D. 1881.

Whereas lately at a term of the supreme court for the Territory of Utah, in a suit depending in said court between James Harrington, George Goss, Ezra Rust, Andrew Hay, James J. O'Reilly, Joseph Gorlinski, and Jabez G. Sutherland, as plaintiffs, and Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky,

as defendants, judgment was rendered in said suit by said court on the 23d day of July, 1881, against the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky; and the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky, having obtained in said court, on the same day,
204 the allowance of an appeal to the Supreme Court of the United States.

Now, the condition of this obligation is such that if the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky shall prosecute their appeal to effect and answer all damages all damages and costs, if the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

ROBERT C. CHAMBERS. [SEAL.]
J. E. DOOLEY. [SEAL.]
T. R. JONES. [SEAL.]

Sealed and delivered in presence of—
ROBERT HARKNESS.

Approved by—
JOHN A. HUNTER,
Chief Justice Sup. Ct. of Utah.

We are satisfied with the foregoing bond, and stipulate that it have effect and be treated as regular without the other appellants joining therein.

SUTHERLAND & McBRIDE.
Pl'ffs' Attys.

Dated July 29, 1881.

Endorsed: Supreme Court. Utah. James Harrington
205 *et al. vs.* Robert C. Chambers *et al.* Supersedeas bond. Filed July 30, 1881. E. T. Sprague, clerk Sup. Court.

Know all men by these presents, that we, John E. Dooley and Thos. R. Jones, of this city of Salt Lake, in the county of Salt Lake, and Territory of Utah, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars, current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 29th day of July, A. D. 1881.

206 Whereas lately at a term of the supreme court for the Territory of Utah in a suit depending in said court between James Harrington, George Goss, Ezra Rust, Andrew Hay, James J. O'Reilly, Joseph Gorlinski, and Jabez G. Sutherland, plaintiffs

and respondents in said court, and Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky, defendants and appellants in said court, judgment was rendered against the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky, and the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky, having obtained the allowance of an appeal to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States, to reverse the judgment in the aforesaid suit.

Now the condition of the above obligation is such that if
207 the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators, or assigns, all such fees as shall accrue to him, the James H. McKenney, clerk, as aforesaid, and charged to the said Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky in the prosecution of said appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

J. E. DOOLEY. [SEAL.]
T. R. JONES. [SEAL.]

Sealed and delivered in the presence of—

ROBERT HARKNESS.

I, John A. Hunter, chief justice of the supreme court of the Territory of Utah, do hereby certify that the foregoing obligors are known to me to be perfectly good and responsible for the within named amount.

July 30, 1881.

JOHN A. HUNTER,
Chief Justice of Utah.

Endorsed: Supreme Court, Utah. James Harrington *et al. vs.* Robert C. Chambers *et al.* Bond to Clerk U. S. Sup. Court. Filed July 30th, 1881. E. T. Sprague, clerk Sup. Court.

208 Supreme Court, Territory of Utah.

JAMES HARRINGTON *et al.*, Appellees,
vs.
ROBERT C. CHAMBERS *et al.*, Appellants.

The appellants having procured the allowance of an appeal herein to the Supreme Court of the United States, the issuance and service of a citation is waived.

It is also stipulated and agreed that the value of the property in controversy in the action exceeds the sum of one thousand dollars.

Dated July 29th, 1881.

SUTHERLAND & McBRIDE,
Plaintiffs Att'ys.
BENNETT & HARKNESS,
Att'ys for App'lts.

Endorsed: Supreme Court, Utah Territory. James Harrington *et al.*, appellees, *vs.* Robert C. Chambers *et al.*, appellants. Stipulation waiving citation and agreeing on value of property in controversy. Filed July 30, 1881. E. T. Sprague, clerk Sup. Court.

209 TERRITORY OF UTAH, } *ss*:
County of Salt Lake, }

I, E. T. Sprague, clerk of the supreme court of said Territory of Utah, in pursuance of the appeal last aforesaid, do herewith transmit to said Supreme Court of the United States a transcript of the record and proceedings, supersedeas bond, bond for costs, and stipulation waiving citation and showing value of property in controversy, all in the said cause of James Harrington *et al.*, respondents, *vs.* Robert C. Chambers *et a.l*, respondents. And I do hereby certify that the foregoing and annexed transcript is a full, true, correct, and complete copy of the original record and proceedings in and of said supreme court of Utah Territory, and of said bonds and stipulation, all in said cause, and all on file or of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court of Utah Territory, at Salt Lake City, this 15th day of August, A. D. 1881.

[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court, Utah Territory.

[Endorsed on cover:] Utah Territory. Supreme court. No. 291. Robert C. Chambers, Lathrop Dunn, Eliza Nelson, and Nelson Boukofsky, appellants, *vs.* James Harrington, George Goss, et al. Filed 14 September, 1881.

111-350

SUPREME COURT U.S.
FILED
MAR 26 1884
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 991.

ROBERT C. CHAMBERS et als.

vs.

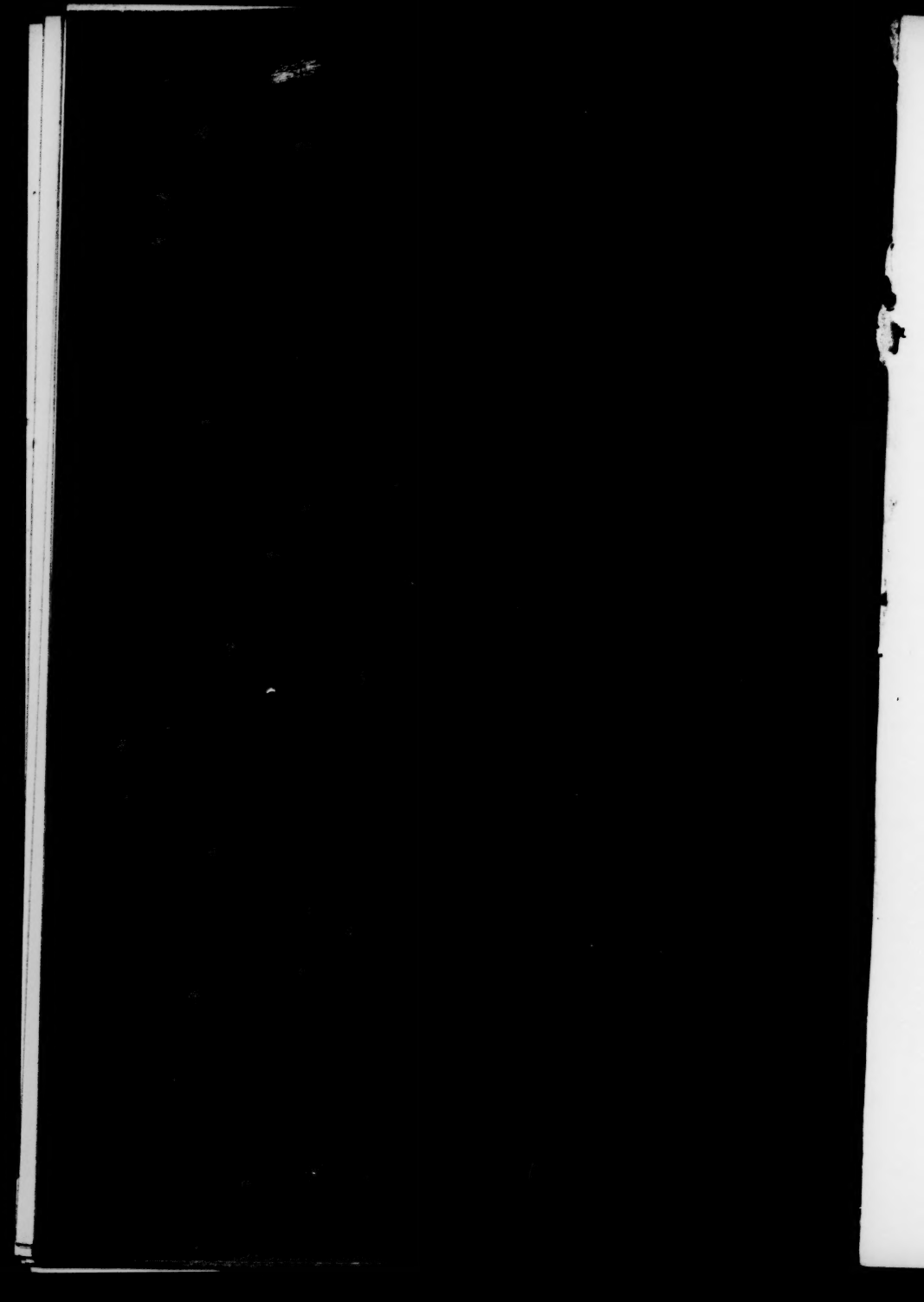
JAMES HARRINGTON et als.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

BRIEF FOR APPELLANT,

By SHELLABARGER & WILSON.

Thomas McGill & Co., Law Printers, Washington, D. C.



IN THE

Supreme Court of the United States.

October Term, 1883.—No. 291.

ROBERT C. CHAMBERS, LATHROP DUNN, ELIZA NELSON, AND NELSON BONKOFSKEY, APPELLANTS,

vs.

JAMES HARRINGTON, GEORGE GASS ET AL.

Appeal from the Supreme Court of the Territory of Utah.

ASSIGNMENT OF ERRORS.

1st. The court erred in overruling defendants' objections to the testimony of the witness Benj. W. Morgan, and permitting him to testify concerning the location of the Lady of the Lake main shaft, its object, and to doing work thereon as and for work on the Parley's Park claim, and in overruling defendants' motion to strike out all evidence admitted concerning said shaft and work done thereon.

2d. Also in overruling defendants' objections and permitting the witnesses, Joseph M. Locke, Nicholas Trewick, Wm. A. Stanton, and others, to testify that at the Parley's Park discovery shaft there was such a vein or indication, as a miner would be likely to follow, with a reasonable expectation of finding ore, and in permitting

witnesses to testify there was such a vein as a miner would locate, and in permitting witnesses to answer questions, in various forms, that the vein there was one a miner would locate and follow.

3d. In overruling defendants' objection and permitting the witness Richard Grant to testify how the indications of the Parley's Park vein, as to ore, at the surface compared with other mines in the district.

4th. In finding as a conclusion of law that the plaintiffs, at the commencement of the action, owned the Parley's Park mining claim, and that the same was and is a valid claim, embracing the premises described in the complaint, and that it is now owned by the Parley's Park Silver Mining Company, by title derived from the plaintiffs pending the action.

5th. In finding, as a conclusion of law, that the defendants have no title or interest in said premises, and had none at the commencement of the action.

6th. In making the third finding and conclusion of law and in finding the plaintiffs were entitled to judgment as therein set forth.

7th. In not finding, as matter of law, that the Parley's Park claim was forfeited for want of work and improvements from July 19, 1878, to September 15, 1879, and the Accidental location valid.

8th. In not sustaining, as a valid claim, the mining claim claimed called the "Accidental," located by Thomas Cassady on the 13th of September, 1879, and by him conveyed to the appellant Robert C. Chambers, on the 18th day of September, 1879, and which was set up in the supplemental answer of the said Chambers (Record, pp. 10 and 11), and in not rendering a decree in favor of said appellant Chambers for the premises included in said mining claim.

Brief.

The two inquiries presented by these assignments of error are——

1st. Was the Parley's Park entry forfeited at the end of the year beginning on the 19th of July, 1878, (see Record, bottom of page 7,) for non-work during that year, so as to make valid the "Accidental" location of the 13th of September, 1879, covering all the disputed ground?

2d. Was evidence improperly admitted from appellees' witnesses as to their *opinions*, &c., regarding the existence and discovery of a lode before the Parley's Park entry, or on it?

We, without separate consideration of each assignment, will consider this first question as an entirety; and in doing so, we maintain that this Cassidy entry was a valid one and ought to have been so held by the court below. Its validity depends upon the following facts:

In September, 1879, in the District Court for the 3d District of Utah, the defendant Chambers filed a supplemental answer. The substantial facts set up in this supplemental answer are found by the Supreme Court of the Territory (Record, page 28,) in finding and adopting the facts found by the referee. These facts found by the referee, which bear upon the question set up in this supplemental answer, are in their substance the following, (see Record, page 9):

First. That Thomas Cassidy, on the 13th of September, 1859, claiming that the Parley's Park mining claims had theretofore been forfeited for the want of work and improvement thereon, located a mining claim called the "Accidental," *embracing the premises in dispute in this case*, and embracing all that part of Parley's Park mining claim lying eastwardly of the easterly end of the line of the Ontario mining claim.

Second. That said Cassidy, on said 13th of September,

1879, posted a written notice of location on the lode or rock bearing silver, found within said claim, and at the discovery point. Said notice described the claim by reference to natural objects and permanent monuments so that it could be identified, and described it by metes and bounds, and also contained the name of the locator and the date of the location.

Third. That said Cassidy, on the 15th day of September, 1879, filed a copy of the said notice of location in the office of the recorder of the said Utah mining district for record, where the same was duly recorded.

Fourth. That said Cassidy and his grantee of said claim have in each year since the said location done work and made improvements thereon of the value of more than $100.

Fifth. That on the 19th of September, 1879, the said Cassidy conveyed the said "Accidental" claim to the defendant, Robert C. Chambers, who has ever since owned the same.

Sixth. That during the year beginning the 19th of July, 1878, the owners of Parley's Park claim were also owners of two certain claims called respectively the "Central" and the "Lady of the Lake," the "Central" adjoining the Parley's Park, and the "Lady of the Lake" adjoining the "Central" mine; and with a view to the future working and development of all three of the said claims, the owners thereof located what is called the "main shaft" *in the "Lady of the Lake" surface ground;* that said shaft is in such proximity to the said Parley's Park mining claim that the work in it has a tendency to develop said claim, and the said shaft was located and intended for the purpose of developing all of said claims. (R., p. 7, finding 5.)

Seventh. That during said last-named year, to wit, the year beginning the 19th of July, 1878, work was prosecuted in the said shaft by improvements made thereat exceeding in value $300, and of not less value than $2,000.

No work was done in said year after July 19, 1878, *and prior to the* 15*th of September*, 1879, *in the Parley's Park surface ground or within the limits by the owners thereof.*

The plaintiffs below, the appellees here, offered the evidence of B. W. Morgan to prove what work was done on the surface of the Lady of the Lake mining claim for the purpose of establishing and claiming it as work done on the Parley's Park mining claim. To this the defendants below objected as immaterial and irrelevant to prove what was done on the Parley's Park. It was immaterial to prove what they did to the three claims. (See R., pp. 37, 38, *et seq.*) The evidence was admitted by the court below to show what work was done on the Lady of the Lake surface in said shaft as if the work were done on the Parley's Park surface. To this exceptions were taken, and this ruling was sustained by the Supreme Court below, and was assigned for error in that court. (See assignment of errors No. 2, R., p. 125.)

From the foregoing facts it is seen that the court held, over the exceptions by the defendants, that the sinking of a shaft on the surface of *one* separate and distinct mining claim and not even an adjacent might be proved in order to establish the fact that work was done on another, to wit, the Parley's Park mining claim, during the year beginning the 19th of July, 1878.

The defendant Chambers owned this "Accidental" mining claim, as appeared by the findings of fact; and if the Parley's Park mining claim was forfeited, then there was error in overruling said exceptions and in holding that work done on one mining claim may be made the equivalent for work done upon another mining claim, such work being upon a "shaft" and not a tunnel.

Upon the foregoing facts we suggest the following points:

First. That it is expressly found as a fact that within

the year beginning on the 19th of July, 1878, and prior to the 15th of September, 1879, no work was done on the Parley's Park surface ground or within its limits. (See R., bottom of p. 7 and top of p. 8.) And therefore the Parley's Park mining claim was absolutely forfeited prior to the date of the said Cassidy entry, on the 13th of September, 1879, and the said land entered by the said Cassidy was theretofore forfeited and open to re-entry on said 13th day of September, 1879, unless such forfeiture is prevented by the work that was done in said "shaft" upon the surface of the Lady of the Lake mining claim. The referee and the court below held that said work on the Lady of the Lake did enure to the benefit of the said Parley Park mining claim, because it was done "with a view to the future working and development of all three of said mining claims owned by appellees, the Central, the Lady of the Lake and Parley's Park, and because the said main shaft, located on the Lady of the Lake mining claim, is in such proximity to the said Parley's Park mining claim, that the work in it has a *tendency* to develop said claim, and said shaft was located and intended for the purpose of developing all of said claims."

In the case of Belk *v.* Meagher (104 U. S., 279) this question of such absolute forfeiture is passed upon by this court, and the court hold, what the statute expressly provides, namely, that after the expiration of the year from the last work done, the mining claim is again open to re-entry.

The only question, therefore, arising upon this Cassidy entry of the "Accidental," as to the validity of that entry, is whether the working of the main shaft upon the Lady of the Lake, as described in finding five, R., 7, satisfied the requirements of the statute, which is that "not less than one hundred dollars' worth of labor shall be performed or improvements made during each year ON

each claim located after the tenth day of May, 1872." (Rev. Stats., sec. 2324.)

The section further provides that "upon a failure to comply with these conditions, the mine, upon which such failure occurred, shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after the failure and before such location."

Here there is no contention, and the findings of fact show that it was not so, that the owners of the Parley's Park claim had resumed work before the entry by Cassidy on the 13th of September, 1879.

We submit that it is quite plain that work done on the Lady of the Lake in sinking a shaft is not work coming within the express and unambiguous requirements of this statute, that "*on each claim located* after the 10th day of May, 1872," (and this was one so located,) "not less than one hundred dollars' worth of labor shall be performed OR improvements made thereon during each year." Under act of 1872, as to mines located after May 10th, 1872, there is a forfeiture where an interval of one year between work occurs. (Sickles' Mining Laws, 389-373-394.)

In the first place, the letter of the statute is explicit and unambiguous, and not open to construction, that the work must be *on* the mining claim. The statute requires each mining claim to be specifically and exactly located and its boundaries defined, and this for obvious reasons, to wit, to prevent conflicts and furnish record evidence of the exact boundaries of each mining claim. Any departure from this requirement of the statute does not only violate the letter of the statute, but would violate all the policies of the law which so expressly requires the exact boundary of every mining claim to be staked, surveyed, platted, recorded, and *patented* by the boundaries so fixed. (5 Sawyer, 449.) What the words of the statute, there-

fore, mean when it says "*on* each claim located after the 10th day of May, 1872," is incapable of being misunderstood, and the courts are not at liberty to make statutes or to hold that the statute is not reasonable in forbidding work done on some *other* mining claim, which *may* have a "*tendency*" to benefit the one in question, from enuring to the preservation of a mining claim upon which the work was not done.

Second. Such a holding would be in violation of the entire policy of these mining statutes requiring work to be done on the "surface"—or in following a vein having its apex on the surface—of each mining claim, because if the sinking of a shaft on one mining claim shall be allowed, owing to some imaginary "tendency" to extend its benefits over all other surrounding mines and mining claims so as to satisfy this requirement of work "*on*" each claim, then one mining shaft may be made to monopolize and take up all the surrounding country, merely because some witness may imagine that this shaft will have a "tendency" to benefit other mines. No such indefiniteness or uncertainty was meant by this statute to be tolerated, and the application of such a doctrine to this important branch of the law will work a ruinous subversion of the policies and designs of the law. That design was to make the doing of work within each mining boundary to be the *one*, *open*, *notorious*, *overt*, *visible*, and unmistakable fact, serving as a *notice* to all the world that such mining claim is not forfeited. This court has held that actual *possession* by the mining claimant is not requisite. (104 U. S., 279.) There is therefore left nothing serving as a notice that a claim is not abandoned, and not open to re-entry, except this overt and unmistakable fact, namely, that the requisite annual work is being done *upon* the very claim so kept in life by the work.

Third. But if the reasons already given why work in making a shaft done upon one mine shall not be treated

as work done upon another mine, in contravention of the letter of the statute, are not to be regarded, as we think they are, as conclusive, then the conclusive legislative interpretation, upon this point, of this provision of the statute is furnished by the Act of the 11th of Feb'y, 1875, (18 Stats. 315; Rev. Stats. 2324.) This Act of the 11th of February, 1875, is in these words:

"That section 2324 of the Revised Statutes be and the same is hereby amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes opened by the said persons or company, the money expended in the said tunnel shall be taken and considered as work *expended on said lode or lodes*, whether located prior to and since the passage of said act; and such person or company shall not be required to perform work on the *surface* of said lode or lodes in order to hold the same as required by said act."

Here, therefore, this section 2324 has, by the amendment of the 11th of February, 1875, incorporated *into it* a provision which makes the construction of a "tunnel" for the purpose of developing a lode or lodes to be equivalent to doing work upon the surface of the mining claim benefited by the tunnel, and it makes *nothing else* than the running of a tunnel have such effect.

To hold, therefore, as the court below did hold, that the making of a *shaft* shall have the same effect as the act of 1875 gives alone to the making of a *tunnel*, is simply to allow the courts to legislate into the statute that which is in direct and palpable violation of the very letter of the statute.

Please notice here that this legislation of 1875 makes use of the word "surface." It says, "And such person or company shall not be required to perform work on the *surface* of said lode or lodes in order to hold the same as required by the said act." So that the use of these words, "on the surface of the said lode or lodes in order

to hold the same as required by the said act," is a declaration by Congress that all other work than the making of a tunnel must be work on the "surface" of the lode or the claim which it is to keep alive, or work commencing on the surface and prosecuted *thence* downward.

The conclusiveness of this point upon the case, if held with appellants, will justify them in its further enforcement.

First. And the first suggestion we make, in this further enforcement, is that the finding of facts, No. 5, (R., 7,) gives prominence to the idea that the "view" and the "intention" with which the "shaft" was made on "the Lady of the Lake," such intention being to benefit Parley's Park, is an element which makes it work "*on*" the Parley's Park. In other words, this doctrince substitutes for that most visible, tangible, and provable thing, "*work* on the claim," that most invisible, intangible, and unprovable thing, "*intention.*" In refusing to allow work even on a tunnel which *is* under the act of 11th of February, 1875, but which was not so done as, under that act to be accredited to the "Headlight" claim, unless the fact that the tunnel was "*designed*" for developing *both* the "Headlight" and the Mammoth claims, the Commissioner, in refusing to allow the "design" to help out the Headlight, forcibly states the reasons against substituting "design" for "*actual* expenditures." He says: "Express requirements of statutes must be strictly followed; and where one way is prescribed in which a thing may be done none other can be substituted." * * * "If the Mammoth company had opened a tunnel and paid the expenses thereof to develop their mine, and it was merely *designed* (as expressed by the deputy surveyor) to work both mines through such tunnel, the expenses thereon are not to be accredited to the "Headlight," &c. * * * "*Actual* expenditures by the owner of a mine for which the patent is sought are absolutely necessary."

(Decisions of 20 Oct., 1879, 6 Copp's L. O., 123; Weeks on Mines, 422.) In this case the work was in a *tunnel*, and under the act of 11th of February, 1875, it would have inured to the Headlight, though not done "on" the Headlight, if done by the Headlight's owner; and it was sought to dispense with the requirement that the *owner* must do the work in the tunnel by the "design" of those doing it and of the Headlight's owner that it should go to the Headlight. So precisely here it is sought to make work done on a "*shaft*" on Lady of the Lake *inure* to the benefit of the Parley's Park, when the statute says it can only so inure when done in a "*tunnel*," and it is sought to make the "design" that the shaft should benefit the Parley's Park so change the statute as that it shall read: "May run a tunnel *or shaft* for the purpose of benefitting," &c.

This is not only to make, in the courts, a new statute, but it is to base all the future administration of the mining laws on that most evanescent and invisible and unprovable of all things, "intention," and which, because unprovable, the law allows in criminal cases to be *inferred* from overt acts.

Second. This fifth finding of fact finds that "said shaft" on the Lady of the Lake "is in such *proximity* to the Parley's Park mining claim that work on it has a *tendency* to develop said claim;" and on this tendency and intention is based the holding that the work on the Lady of the Lake is work on Parley's Park.

Here, again, is introduced one of the most uncertain, intangible, and unprovable elements that can be conceived of, to wit, "*tendency*," and on its imagined existence is based the power to monopolize and keep in life, in one man's ownership, a hundred claims on which no work was ever done, merely because of some supposed and underground "tendency" of some shaft, at a distance from them all, to benefit all the claims.

To make an imagined or even a real "tendency to benefit" to take the place of *actual* work "*on each claim located*" is to substitute what is even more impalpable than a shadow, for what Congress said should have unmistakable and visible substance, to wit, should be "labor or improvements."

These can be seen and touched, and the court says in Mt. Diablo Case, 5 Sawyer, 456: "Congress plainly required the work to be done by way of continuous, annual assertion or renewal of the original claim or location, and nothing more."

To make a "tendency," and that tendency under ground, spread itself over all the surrounding country, and to be the only possible notice to the world that this surrounding country is monopolized by the one man who is the owner of the "tendency," is, we submit, to repeal the entire policy of our mining laws, or is worse, and turns them into gross injustice.

Third. But it may be asserted that the case of Mount Diablo Co. *vs.* Callison, 5 Sawyer, 439, is an assertion of a contrary doctrine.

When the facts of that case are examined carefully, it will be found to assert the rule we here insist upon, and if any of the language of the judge indicates the contrary, it was outside of the case, and against the definition of work on a claim as laid down in deciding upon the actual facts of that case.

In that case the plaintiff, "the Mount Diablo Mills and Mining Company," was the owner of three mining claims, the Peru, the Mt. Diablo, and the Dinero, and owned them in 1877—the year in which the defendant Callison asserted a forfeiture occurred of the "Dinero" for non-work—it being conceded that there was no forfeiture of the "Dinero" if sufficient work was done on it in 1877, (5 Sawyer, 451,) and the whole question was, whether in 1877 sufficient work was done *on* the "Dinero" claim. Be-

cause if not, then it was open to the opposing location of February, 1878. The court then finds that, in that year, certain specified work was done on the surface of the "Dinero," but that it "did not distinctly appear that the worth of this work on the surface was so much as $140" in that year; but that this work on the surface showed (page 452) that all the work performed in this connection was intended to be applicable to these mines. The court then expressly finds that "*some* $3,000 *worth of labor was done during this year* 1877 *within the surface line of the "Dinero," if such lines are dropped perpendicularly down.*" This the defendants said was *not*, properly speaking, work on the Dinero claim, but within and on the Mt. Diablo lode which, in its downward course, has pitched into the "Dinero;" because it was work done in prospecting on work for the main tunnel, which tunnel begins on Mt. Diablo ground.

It thus expressly appears that over $3,000 worth of work was done on the Dinero claim in 1877, if the party was entitled to be credited with work done in a tunnel or in making drifts which were *vertically under the surface of the Dinero.*

Then on page 455 the court defines what a mining claim is within the meaning of the acts of Congress, and says:

"*Work on a claim is work done anywhere within the lines upon the surface and anywhere within those lines below the surface, where they are carried down vertically into the earth.*"

Applying this definition to work done *on* a mining claim to the case, the contention of the defendant was that the owner of the "Dinero" should not have the benefit of work done *under the surface of the Dinero*, because it was work on tunnels and drifts the *opening of which was in the* Mount Diablo claim.

In other words the contention was that, since the *same* claimant owned both the Mount Diablo and the Dinero, and since he began his tunnel on the Mount Diablo, and ran it under the Dinero, therefore work done in the tunnel *vertically under the Dinero* should be credited to the Mount Diablo, because the tunnel's mouth was on claimant's Mount Diablo claim. Also, it was contended, that work done vertically under the Dinero, within a ledge or vein having its apex in Mount Diablo, was work on the latter claim.

This view the court rejected, and said:

"Had the Dinero been owned by another than the plaintiff, and had this $3,000 worth of work been done by such other owner at the point where it was in fact done by the plaintiff, there could not have been, as seems to us, any pretext for claiming a forfeiture against the Dinero owners on the ground that the work done, though on the claim, turned out to be within a lode which had its apex outside of the Dinero surface line. We think the fact that the plaintiff was the owner of both of these, Mt. Diablo and the Dinero, ought not to be deprive it of the credit for this work done on the Dinero. It is literally and in fact work done *on* the Dinero claim. If an outside lode dip into the claim the work may also be done inside that lode, but at the same time on the Dinero claim. * * * * We thereore conclude that *when a miner does the necessary labor anywhere within his boundaries, upon the surface or below it, the condition of the mining law as to labor has been complied with.* * * * * *Congress plainly required this work to be done by way of continuous annual assertion or renewal of the original claim and location, and nothing more.* This being so it would hurt our sense of justice did we feel compelled to say that $140 worth of labor done on the surface, utterly valueless as a development of the claim, would have saved the claim from forfeiture, and that $3,000 worth of work *done below the surface cannot.*"

Thus it is seen that this case is one—in the definition it gives of what is work on a mining claim—deciding *pre-*

cisely what we here assert, namely, that work on a mining claim means work "done anywhere within the lines upon the surface, or anywhere within those lines below the surface where they are carried down vertically into the earth." The language used by the court, on page 557, in regard to work done outside of the claim, must be understood as language employed in regard to the facts of the case before the court, to wit, a case where the work was done on tunnels or drifts. The act of 11th of February, 1875, which was in force at the date of the origin of this controversy, expressly makes such work on tunnels to be applicable to all claims on the ledge or lode. Hence this language of the court on page 557, taken under all its conditions, is not against the doctrine we assert.

Fourth. Please observe that the fifth finding of facts does not bring the making of the shaft on the Lady of the Lake to be the beginning of a tunnel, or part of a tunnel, or preparatory to a tunnel, or to have anything to do with a tunnel, so as to make the work on the shaft to be within the tunnel act of 11th February, 1875. (18 Stats., 315.)

Since that act (see *supra*) carefully confines itself to "running a tunnel" for the purpose of developing a lode or lodes owned by the maker of the tunnel, and confines the dispensing with work on the surface of the lodes to cases where work was done in tunnels, and only in tunnels, therefore, most manifestly, work in a "shaft" is not work in a tunnel, and hence this fifth finding of fact cannot, by construction, or stretching, or torture, be made to be a finding of the fact of work done within this tunnel act. On the contrary, it not only confines the work done to work in a *shaft*, but it relies on "proximity," as showing a "tendency" in this shaft to develop the Parley's Park. In other words, there is in the fifth finding that which shows that the future working of the three mines was to be aided by the mere "tendency" of

the shaft on the Lady of the Lake to, in some way, benefit this Parley's Park mine.

To hold, therefore, that this fifth finding brings the case within this act of 11th February, 1875, and that work on a *shaft* shall have the same effect as that act gives to no other work than that on a *tunnel* is to violate, as we think, nearly every settled rule for construing statutes. It violates the maxim, "*expressio unius est exclusio alterius.*" (10 Cal. 189; 20 Ark., 410; 10 Minn., 23, and cases cited, note "4;" Broom's Maxims, side page 664, top pages 663–7, Amer. Ed.)

When a statute says "running *tunnels*" shall excuse work on a claim, to hold that "running" anything else shall have the same effect is to defy this maxim, as well as common sense. It violates the rule that says "That shall not be construed which needs no construction." It violates the rule which says where an amendment introduces a new clause into a section in the nature of a *proviso*, there the amendatory proviso is *strictly construed*, so as not to destroy or change the general provisions of the section any further than is *plainly* required. (U. S. *vs.* Dickson, 15 Pet., 165.)

As applied here, the general provision of section 2324, requiring annual work on each claim, will not, by this amendatory *proviso*, be repealed, except so far as the proviso *clearly* does this. It violates the rule which regards the general policy of the system of laws being construed. This it does by abolishing the only visible and overt act, established by this system as notice to the world that a mining claim is not abandoned, and puts in its place a secret intention, and an imaginary underground "tendency."

As to the second assignment of errors, we remark that it presents this important practical question:

The statute tolerates no mineral location, except upon

and after the discovery of a vein or lode within the claim, (Rev. Stats., sec. 2320.) This discovery and existence of a vein are facts, and must be proved like other facts, and this exception presents the point, could defendant ask Locke and the other witnesses, in the attempt to prove these *facts*, whether in their opinion (for the questions amount to that) there were such "indications of a vein as a miner would be likely to follow with a reasonable expectation of finding ore," &c., (R. 49.)

Nine witnesses were permitted to say there was such an indication of a vein as a miner would locate or follow with the expectation of getting ore.

The law requires the discovery of a lode; not of something a miner may call a lode. If, as experts, the witnesses could give opinions, (which we do not admit,) they could only give their own opinions, and it was not competent for them to state what would be the opinions of miners. This is extending the testimony of experts beyond the bounds of facts and their own opinions on the facts, and further than any authority will justify.

Greenleaf, vol. I, sec. 440, 441.
53 N. Y., 603.
54 N. Y., 90.

Or take, as a specimen of all, the answer of Trewick, (R. 41,) where he says, speaking of this vein, "If I had been passing over the country I would have been *likely* to locate that and follow it some distance.

Certainly as good a definition as exists of what the act of 1872 means by the words "vein or lode," is furnished by Justice Field in the Eureka Case, 4 Sawyer, 312, where the definition is this:

"Any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

"All deposits of mineral matter found through a min-

eralized zone or belt, coming from the same source, impressed with the same forms, and appearing to have been created by the same process."

"Any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock" is a thing capable of being seen, known, found, followed and proved. Of course there are degrees of obviousness in these. Still the statute designed the existance and discovery of this fact should precede every location, and designed that the tangible and palpable fact should be proved—and proved by such evidence as is, in law, admissible in proving such visible and palpable facts. It does not mean to substitute for such proof (as was done in this case) the statement that "I think a miner would think this indication worth following." Or "I think I would be likely to have followed it." This is substituting a conjecture of a conjecture as to what would be "*likely*" for one of the most palpable of physical facts. And this fact is to be thus proved by showing the existence of the most shadowy opinion by one man in regard to what he thinks another man would think or do.

This fact of a lode's existence is not a matter determinable as one of science or skill to which classes evidence of opinions is confirmed, (1 Phil. Ev., side page 781,) and hence, as that author there states, "witnesses are not permitted to state their views of legal or moral obligation, *as to the manner in which others would probably be influenced* in case the parties had acted one way or the other."

Here witnesses, instead of giving to the court the facts seen by them relating to the existence of a lode, were allowed to give what they thought would likely be the conduct of other miners, had such other miners seen what they saw.

This was clearly erroneous, and it was most material, because if the Parley's Park was located without having

discovered a vein, then that location was void and the Switzerland good.

The third assignment of errors presents the same legal idea, (R. 51,) and we need not comment on it separately.

SHELLABARGER & WILSON.

111-310

SUPREME COURT U.S.
FILED
MAR 23
JOSEPH H. McKENNEY, Clerk

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 291.

ROBERT C. CHAMBERS, ET AL., APPELLANTS,

vs.

JAMES HARRINGTON, ET AL., APPELLEES.

Appeal from the Supreme Court of Utah Territory.

BRIEF FOR APPELLEES.

BY J. G. SUTHERLAND AND
JNO. R. McBRIDE.

WASHINGTON, D. C.
GIBSON BROTHERS, PRINTERS.
1884.

Supreme Court of the United States.

October Term, 1883.

No. 291.

ROBERT C. CHAMBERS ET AL., APPELLANTS,

vs.

JAMES HARRINGTON ET AL., APPELLEES.

Appeal from the Supreme Court of Utah Territory.

This was an action brought in the District Court of the Third judicial district of Utah Territory, in pursuance of the statute of the United States, (sec. 2326, Rev. Stat.,) upon an adverse claim filed in the Land Office of the United States at Salt Lake City by the plaintiffs, contesting the right of the defendants to a patent for a mining location called the "Switzerland."

The application for patent was filed June 8, 1876, in the Land Office. On August 7, 1876, the adverse claim of the plaintiffs below was filed in that office, and, as required by the statute, to make the same effectual, this suit was brought to try the "right to the possession of the premises in conflict."

A judgment for the plaintiffs below (appellees here) was rendered in the District Court. From this judgment an appeal was taken to the Supreme Court of Utah, where the judgment was affirmed. From this last judgment this appeal is taken to this Court.

NO APPEAL IN THIS CLASS OF CASES.

Our first point is that no appeal is allowed by law from the decision of the District Court in this action.

This is a statutory proceeding in aid of the Land Department in disposing of the mineral lands to occupants claiming them. It is part of the process by which the United States sells the land to claimants under its laws. This statute is special, refers the contest, which is initiated in the Land Office, to a court of "competent jurisdiction," provides for the effect of the judgment when rendered, provides for no appeal, and contemplates none. These proceedings were intended to be summary. The judgment of the court is taken to relieve the Department of the trial of a single question, the right of possession; and to engraft upon such a proceeding all the incidents of an action at law, with its attendant results of appeals, and endless delays, is to defeat the purpose of the law.

We refer the Court to the following cases, analogous in character, in support of this position:

U. S. *vs.* Nourse, 6 Pet., 470–493.

Case of Ferreira, 13 How., 43.

——— *vs.* The Judges, 3 Wall., 673.

We insist that neither the supreme court of Utah nor this Court has any jurisdiction in this class of cases, and that the judgment of the court in which the action was brought is final.

ON THE MERITS.

The appellees' mining claim is alleged to have been located July 19, 1872; and the appellants claim October 3, 1874. Hence the Parley Park claim, if valid in its inception, was not subject to be relocated in October, 1874, unless there

had been a failure to do the required annual work. The referee found all the facts necessary to a regular location of the Parley Park claim; also that the work had been done. It does not appear that there were any other conditions; Congress imposed none, nor did the miners of the district.

The exceptions taken to the sufficiency of the evidence to justify these findings were overruled by the territorial supreme court, and they cannot be reviewed on this appeal.

18 U. S. St., Pt. 3, p. 27.

It is only necessary, therefore, to discuss the exceptions for alleged errors in law specified in the statement. We contend—

I. That no valid exception was taken to any ruling in the admission or rejection of evidence affecting the conclusion that the Parleys Park claim was duly located.

The exceptions taken to such rulings are those mentioned in the third, fourth, fifth, and ninth specifications of error in the concluding part of the statement.

1. The testimony referred to in the third specification was properly admitted.

Record, 39–52.

It is testimony of witnesses who were expert miners. They severally testified, from a personal examination, that, in their opinion, there was a mineral vein in the discovery shaft of the Parleys Park claim. The questions objected to were supplemental to the witnesses' description of the vein, and their opinion that there was one; and they were manifestly put with a view to showing that there was a lode within the meaning of that term used in the statute as judicially defined in the Eureka Case, 4 Sawyer, 311.

The questions were put with some verbal changes, but they were substantially alike, and in this form: "State whether, in your opinion, a miner would follow such an in-

dication with a reasonable expectation of getting ore?" They merely call for the opinion of the witnesses whether such indications so denoted ore as to induce, in the minds of persons conversant with such signs, a reasonable expectation of finding ore by following them in a lode.

The propriety of such questions to an expert, testifying upon a subject within the scope of his special knowledge, and which he has personally examined, depends upon no doubtful principles. It is but the ordinary occasion for the use of such testimony.

2 Wharton's Ev., §§ 961 and 962.
Matteson *vs.* New York, &c., R.R. Co., 35 N. Y., 487.
Fort *vs.* Brown, 46 Barb., 366.
McPaddin *vs.* N. Y. C. R.R. Co., 47 Barb., 247.
Hawes *vs.* New England Ins. Co., 2 Curt., 229.
Clark *vs.* Willett, 35 Cal., 534.
Cottrill *vs.* Myrick, 12 Me., 222.
Read *vs.* Barker, 30 N. J. L., 378.
The Clipper *vs.* Logan, 18 Ohio, 375.
Detweiler *vs.* Graff, 10 Pa. St., 376.
Kahn *vs.* Old Tel. Co., 2 Utah, 174.

The questions were not unfitly framed to elicit such evidence as was competent. Such expert witnesses might be permitted to state that such a fissure and its filling would be noticeable to a miner as being apparently a mineral vein, and were such as would be generally acted upon as a lead to ore.

The reference in the question to miners only, calls attention expressly to those who would be understood if the question had been impersonal and wholly abstract; for the term "lode or vein" in the mining act of 1872 is held to have been employed in the sense in which "miners" understood it. Undoubtedly a lode may exist which would sus-

tain a mineral location, though not promising enough to induce miners generally to expend labor upon it. Such a lode would be a debatable one. It is therefore desirable that the testimony be specific enough in description and detail to remove all question. And if practical miners can be admitted to testify at all as experts, they must be permitted to give their opinion upon such optical and other data as have importance in their experience.

What in the abstract is known among miners as a "lode" or "vein" may be proved by witnesses of that class; and on the same principle it would be competent to ask such a witness whether the indications, hypothetically stated, or which he had seen in the particular case, were such as to constitute a lode or vein. A question to such a witness may substitute for the term vein or lode what it has been determined to signify. The questions objected to were so constructed, and that substitution is really the point of the objection. There is no substantial difference between a question whether in the opinion of the witness the particular indications stated or seen constitute a vein or lode, and one which invites him to state whether a miner would follow such indications with a reasonable expectation of finding ore.

2. There was no error in allowing the respondents to show the ore-croppings at other places than that called the discovery within the limits of the Parleys Park claim.

There was no objection to the testimony as it was admitted. On the contrary, there was an express statement on the part of the appellants that it was not objected to. (Record, 42.) The respondents offered the testimony on the theory that a discovery of a vein or lode at any place within the limits of the claim located would sustain the location. This theory was contested by the appellants, and was not acted upon by the referee. That testimony, so far as it bore

on the question of a vein at the "discovery point," was conceded to be admissible by the appellants, and for that purpose they state that they did not object to it. It was admitted only for that purpose. And it was considered for that purpose only; for the finding is that there was discovered a vein at the "discovery point," and there is no finding of a discovery at any other point on the claim.

We insist that the testimony was admissible to show a discovery anywhere within the limits of the claim located. The validity of a mineral location does does not depend on finding a vein at the particular place called the discovery.

Section 2320, R. S. U. S.

3. There was no error in permitting the witness Grant to answer the question how the indications of this vein as to ore at the surface compared with the ore indications at the surface on other mines in the same district.

Record, 50, 51.

The answer was not important; it was only that the surface indications on this claim so compared were good.

This witness was an old miner, and had done much prospecting for veins in that district. In order to understand the signs of ore on one claim it must be assumed that miners have in mind what similar signs have been proved to mean on other neighboring claims. All conclusions of an expert must depend on comparisons.

II. The exceptions to the rulings of the referee in the admission and rejection of testimony relating to work on the Parleys Park claim were not well taken.

1. As to exceptions relating to proof of work prior to the location of the Switzerland claim.

Record, 61, 64, 89.

The point of the objection is the same to all the ques-

tions. The alleged error is to sustaining an objection to questions referred to in specifications 6, 7, and 8, on page 126 of the record.

The several witnesses referred to had gone recently to that mining camp, and they were asked to estimate the value of certain work done several years before. The value was to be ascertained at the time when it was done. It was part of the annual work, and manifestly to be estimated according to prices current at that time. These witnesses were not shown, and could not be presumed to know the value in question. The objection was made and sustained on that ground.

2. As to the exceptions relating to proof of work on the Parleys Park claim after the location of the Switzerland claim.

The fifth finding shows how the work was done for the year commencing on the 19th day of July, 1878. There was an exception taken to the admission of the evidence on which this finding was based, and to the conclusion of law thereon as to the continuance of the appellees' title.

Record, 37, 38.

Raising no question now as to the materiality of this finding, we insist that the work done on the main shaft sunk on the Lady of the Lake claim was in part work done on the Parleys Park claim.

The Parleys Park, Central, and Lady of the Lake claims were owned and by this shaft were intended to be worked together. They constituted in the plan for their development one parcel, and the work projected included the actual exploration under ground of a large portion of the Parleys Park claim. The shaft put down on the Lady of the Lake was capable of convenient use in the development of all these claims. The expenditure was sufficient in amount. One-

third of the expenditure on this shaft was properly considered as expenditure in labor on the Parleys Park claim.

Mount Diablo M. Co. *vs.* Callison, 5 Sawyer, 440.
Jupiter M. Co. *vs.* Bodie C. M. Co., 7 *id.*, 96–116.
English *vs.* Johnson, 17 Cal., 107.

The work required by the statute is to evince the good faith of the claimant. It is the minimum of private use necessary to continue the segregation of land located from the public domain. It may be work of any kind which advances or tends to accomplish the object for which the public mineral lands are open to private occupation. Hence, it will satisfy the requirement if it has reference to finding a valuable deposit of ore in the claim, or to its extraction and removal. The claimant is allowed and expected to adapt the work to answer just these ends. No work on a mining claim, held legitimately as such, can be beneficial to any one for any other purpose. If he has several contiguous claims his work must have reference to this purpose as to each, and any work or expenditure which even remotely tends to the finding of ore in a claim, if there is ore there, is work on it.

There is nothing in the language or purpose of the statute which compels the owner of one or more claims to do useless work, that prevents him from adopting a general plan suited to the situation of his claims to develop and work them with the greatest economy. If in the judgment of the owner the best method of exploration is by a tunnel commencing on adjacent ground, his labor on that tunnel, even before it reaches the boundary of the claim, should be taken into account as work on it. Otherwise, if more time than the work period should be consumed in reaching that limit, he would be, or might be, obliged to do the amount required of work where no work could be useful,

and merely to answer an arbitrary exaction. No useful purpose within the policy of the statute could be subserved by such a technical construction, and it would be contrary to all the traditions of miners and the rulings which have given them a judicial sanction.

English *vs.* Johnson, *supra.*

Rogers *vs.* Cooney, 7 Nev., 219.

The sinking of the main shaft, centrally, in the ground intended to be explored and worked, including a large part of the Parleys Park claim, was work on all that ground as directly as it could be done for the discovery of ore. That shaft was reasonably adapted to facilitate the exploration and miner-like development of every part of the three claims believed to contain ore.

3. Whether the work was done on the Parleys Park claim for the year commencing July 19, 1878, could not be made a material issue in this case.

It is well settled that the Land Office, in the disposition of the public lands, cannot be controlled in the exercise of its powers by the courts. While an application to purchase is pending and the proceedings are *in fieri*, that office has exclusive jurisdiction of the subject.

Gains *vs.* Thompson, 7 Wall., 347.

People *vs.* Kidd, 23 Mich., 440, 445–447.

Brandt *vs.* Wheaton, 52 Cal., 430.

An exception to this rule exists where a suit is brought under section 2326, U. S. R. S., for the determination of an adverse claim filed in the Land Office. The determination of that claim by a court of competent jurisdiction governs the Land Office, but *no other* will have that effect.

No party deriving title to the premises which originated after application for a patent, and after the time to file an

adverse claim has expired, can bring suit either to enjoin the applicant or to obtain a judgment which will prevent the issue of a patent or determine its effect; nor can any such suit or judgment be thus made to affect an adverse claimant. No suit is authorized except upon an adverse claim filed in the Land Office during the period of publication. The determination of that claim is to aid the Land Office in disposing of the premises on the application pending.

It may be said that the subsequent delinquency of the plaintiff in doing the annual work, followed by a location of the ground covered by the forfeited claim, negatives the plaintiff's title at the date of such relocation, and therefore would defeat the action. It would equally show a delinquency of the defendants fatal to their application for a patent. But such subsequent facts, though tending to show that neither party has title, are not within the issue which is authorized to be referred to a court by section 2326 and the amendatory act of March 3, 1881. This amendatory act suggests the possibility of title not being established by either party, but it must mean the title stated in the application or adverse claim.

See Maxon *vs.* Wilkinson, 2 Montana, 421.

The applicant would not be permitted to go on in the Land Office under his application by acquiring this new title either before or after judgment. He is only allowed to so proceed after *perfecting* his title stated in the application. The adverse claimant could obtain no standing in the Land Office under the adverse claim filed by obtaining a judgment not establishing that adverse claim, but an independent and later title.

A new title originating after the contest commenced in the Land Office on an application for a patent, subversive

of the title there claimed on either side, and arising from a forfeiture thereof, would not be such a title as, when acquired by either contestant, would enable him to obtain a patent under the pending application. Nor does the Land Office regard such title as subject to adjudication in the suit brought under the statute on an adverse claim. No title can be decided in that suit which was not involved in the issue made by the adverse claim filed within the prescribed period.

Sickel's M. Law, p. 275.

The presumption that the applicant is entitled to a patent, and that no adverse claim exists, conclusively affirms the validity of the applicant's title, as stated by him in his application, (sec. 2325, R. S. U. S,) except as actually controverted by the adverse claim filed. The suit which is required to be brought must be adapted to determine the possessory title between the applicant and the adverse claimant on the very point which is thus controverted. If the applicant succeed in the maintenance of his title, by setting it up as a defence to the protest suit, he may file the judgment roll in the Land Office, but he will still be amenable to the jurisdiction of the land department on all matters not included in that adjudication. He is then in no better condition than he would be had no adverse claim been filed, and he had stated a good title in his application. In the one case his title is adjudged in his favor; in the other it is declared incontestable by the statute. But in either case he must comply with the statute in order to obtain a patent. His right to a patent may be challenged in that office on any material departure from it. And the effect of such departure will be decided by that tribunal. If the Land Office is informed that after the date of the issue in the suit the applicant has forfeited his claim

by failure to do the annual work, and that a new location has been made, the rights of the claimant under the new location will be considered and protected in that office.

Colorado Central *vs.* American Flag.

Copp's U. S. M. L., p. 255.

The appellants, by their application for patent and by their original answer, rest their title on the Switzerland location. But the defence and title set up by the supplemental answer is a subsequent title implying the invalidity of the Switzerland location. The work was done every year on that location, and so the referee has found. The supplemental answer, therefore, sets up a title depending on the original invalidity of the Switzerland claim. It is inconsistent with the original defence and with the appellants' position as applicants for a patent of the Switzerland claim.

Such a new and adverse title, accruing during the pendency of a suit, cannot be made use of to support that action or the defence in it by any supplemental pleading. The Utah practice act provides that "the plantiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer; that the making of supplemental complaint or answer shall not be a waiver of the cause of action set up in the former complaint, or of the defence set up in the former answer."

C. L., Utah, sec. 1291, p. 417.

Under this statute it is held that the principles which governed supplemental pleading in chancery were applicable.

Wattson *vs.* Thibon, 17 Abb., 184.

Accordingly the matter of a supplemental complaint or answer must be consistent with, and in aid of, the case made by the original pleading.

2 Waite Pr., 471.

2 Dan. Ch. Pr., 1515, note 1.
Slawson *vs.* Englehart, 34 Barb., 198.
Dana *vs.* Baker, 12 How. Pr., 521.

We submit that there is no error in the record.

J. G. SUTHERLAND,
JNO. R. McBRIDE,
Att'ys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 297.

ANTON EILERS, APPELLANT,

vs.

N. C. BOATMAN, E. M. VARNES, AND E. SELLS.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED SEPTEMBER 19, 1881.

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Supreme court of Utah Territory.

Anton Eilers, appellant,
vs.
N. C. Boatman et al., respondents.

Transcript on appeal from third district court.

Sutherland & McBride, attorneys for plaintiff. Bennett & Harkness, attorneys for respondents.

1 In the district court, third judicial district, territory of Utah, county of Salt Lake.

Anton Eilers, plaintiff,
vs.
N. C. Boatman, E. M. Varnes and E. Sells, defendants.

Complaint.

Plaintiff complains of the defendants, and for his cause of action against them alleges:

That he is now and was, on the 10th day of August, 1877, a citizen of the United States, and over the age of 21 years; that on said date, that portion of land situated in "Little Cottonwood" and "Big Cottonwood" mining districts, Salt Lake county, Utah territory, included in what is now held and claimed by plaintiff as the "Virginia" lode and mining claim, was public, unoccupied, and unclaimed mineral land of the United States government; that

2 he, on that day, entered thereon, and within the limits of said claim, as that day located, discovered a lode or vein of rock-bearing lead, silver, and other valuable metals, and then located and claimed the same with surface ground as the said "Virginia" lode and mining claim, and proceeded immediately to mark out the same by planting posts and monuments at the corners of the claim, and so marking it that its boundaries can be readily traced; also at same time prepared a written notice of location of said claim, which he posted upon a large pine stump over two feet in diameter and four feet high, standing at a point on said claim 50 feet north 40 degrees 1 minute west of the middle of the southeasterly boundary line thereof, and same day filed a copy of said notice for record in the recorder's office of said Little Cottonwood district, where the same is now of record, in book "C," pages 423–4; that in said notice said claim was accurately described by courses, distances and monuments, and as described and claimed consisted of a track fifty feet in width on each side of the middle of the vein, and about 960 feet in length in said Little Cottonwood district, and about 540 feet in said other district; that on the 26th day of September, 1877, plaintiff discovered that the vein or lode of said claim in said Big Cottonwood district ran in a northeasterly direction, and he then, on said last date, changed only so much

of said claim as was situated in said last-named district, and located and claimed the same as now held by him and hereinafter described, and then established posts and monuments on the grounds to define and mark out the same as claimed; also then prepared a written notice as an addendum to his original notice of location, in which he accurately described by courses, distances, and monuments the ground as claimed by said change, and posted the same on said stump, with the said original notice; that within ten days
3 thereafter he caused a copy of said addendum to be filed for record in the recorder's office of each of said districts, where the same is now of record.

Plaintiff alleges that on the 29th day of September, 1877, he caused an official survey to be made by a deputy U. S. mineral surveyor of said Virginia claim, as located and claimed on said 10th day of August, and amended on said 26th day of September, and that as so located, claimed, and surveyed, it is described as follows: Commencing at a point in said Little Cottonwood district at the east corner of said claim, where is planted a post marked U. S. 98, No 7, from which U. S. mineral monument No. 3 bears south 46 degrees 1 minute east 2058 feet distant; thence from said post No. 7 south 49 degrees 59 minutes west 100 feet to the south corner of said claim to a post 4 feet long, marked "U. S. 98, No. 1;" thence north 40 degrees 1 minute west 969 and 8-10ths feet to the summit or divide separating said districts to a post 3x3, 5 feet long, marked "U. S. 98, No. 2," being a witness-post for corner No. 3; thence north 527 and 8-10ths feet to corner No. 3; thence north 49 degrees 59 minutes east 522 and 3-10ths feet to corner No. 4, thence south 743 and 6-10ths feet to said summit or divide, where is a post 4x4 4 feet long, marked "U. S. 98, No. 5," for corner No. 5, also marked "W. C. No. 4," as a witness-post to corner No. 4; thence south 77 degrees 47 minutes west 320 and 4-10ths feet to a post marked "U. S. 98, No. 6," being for corner No. 6; thence south 40 degrees 1 minute east 954 feet to said beginning point post No. 7, containing in area 7 and 295-1000ths acres, and excepting therefrom that portion thereof covered by and included in the flagstaff patent lot No. 38, described as follows: Commencing at a point in the southwest boundary line of said Virginia claim 158 and 1-10th feet north 40 degrees 1 minute
4 west from said post No. 1, thence north 40 degrees 1 minute west 103 feet, thence north 36 degrees east 103 feet, thence south 40 degrees 1 minute west 103 feet, and thence south 36 degrees west 103 feet to point of beginning, containing in area 236-1000ths acres.

Plaintiff further says that immediately after said 10th day of August he commenced work upon said claim, and has up to the present time performed in work and labor thereon over the sum of one thousand dollars, and has, since the location of said claim as aforesaid, been in the continuous possession of all thereof as located, nor has he ever disposed of or abandoned the same or any

part thereof—and has in all respects concerning said claim complied with all the mining laws, rules, and customs of said government territory and said districts, and by reason whereof he is now entitled to the possession and title of said claim, as against all except said government.

Plaintiff further says the said defendants claim to own a pretended mining claim by them called the "Nabob;" that they have recently had a survey made of said Nabob claim, and did, on or about the 29th day of September, A. D. 1877, file in the United States land office at Salt Lake city, Utah territory, their application for a patent from the said United States government for said so-called "Nabob" claim, and as the same is described in their said application, also in the plots of said claim made by them and posted up with their notice of their application for patent, as aforesaid, they include in said application and claim, as a part of their said pretended "Nabob" claim, the following described portion of plaintiff's said "Virginia" claim, to wit: Commencing at a point in the southwest boundary line of said Virginia claim 363 and 5-10ths feet north 40 degrees 1 minute west from the said south corner thereof and said post No. 1, thence along said boundary
5 line north 40 degrees 1 minute west 479 and 5-10ths feet, thence south 48 degrees 43 minutes east 474 feet, and thence south 41 degrees 17 minutes west 72 and 5-10ths feet to said beginning point, constituting an area in conflict, .394 acres.

That after defendants filed said application, as aforesaid, the register of the land office caused a notice of the same to be made and published on or about the 4th day of October, 1877, in the "Salt Lake Daily Tribune," a newspaper published in said Salt Lake city. That on the 21st day of November, A. D. 1877, the plaintiff filed in said land office his adverse claim and protest against the issuance of a patent to defendants for so much of said so-called Nabob claim as is included in said Virginia claim as above stated and described. That said adverse claim and protest was made under oath of plaintiff, and set forth the notice, boundaries, and extent of said Virginia claim, the notice, boundaries, and extent of the conflict therewith, by the said claim and application of defendants, showed the plaintiff's title to his said Virginia claim, and a full compliance by him with all the mining laws and customs applicable thereto, also with said adverse claim and protest, filed a plot made and duly certified to by a deputy U. S. mineral surveyor, showing the position, extent, and boundaries of said "Virginia" claim and of alleged "Nabob" claim, as the same is surveyed and presented in said application of defendants, as well as the conflict between said mining claims as above described.

Wherefore plaintiff brings this suit to determine the rights of the parties in said controversy, and demands judgment against
6 said defendants for the right of possession to said premises in controversy, for costs of suit, and and all other proper relief.

A. EILERS, in person.

Duly verified.

(Endorsed:) Filed December 19th, 1877; C. S. Hill, clerk; issued December 19th, 1877.

Answer.

[Title of Court and Cause.]

The defendants answer the plaintiff's complaint, and state and allege:

Deny that the plaintiff on the 10th day of August, 1877, or at any time before he located the supposed Virginia mining claim, discovered within the limits thereof a lode or vein of rock-bearing lead, silver, and other valuable metals, or that he made any discovery of mineral or of a mineral-bearing lode therein, or that the portion of said supposed Virginia mining claim described in the complaint as claimed by these defendants as part of the "Nabob" mining claim and embraced in their survey and plat thereof, was, on the 10th day of August, 1877, or at any time since, public, unoccupied, or unclaimed mineral land of the United States government, or that plaintiff on the 10th day of August, 1877, or at any time entered on said premises, or has been at any time or is in the possession of the same or any part thereof, or that by virtue of the alleged or any compliance with any mining laws, rules, or customs, or in any other way, he has been or is entitled to the posse-
7 sion or title to said premises, or any part thereof, as against the defendants, or as against all, except the government of the United States.

And the defendants allege that on the 4th day of July, 1877, they were citizens of the United States, and on that day entered upon and explored the premises hereinafter described as the Nabob mine and mining claim, discovered therein a vein and lode of rock and earth in places bearing silver, lead, and other precious metals, and thereupon located and appropriated 1,500 linear feet thereof, together with surface ground 50 feet wide on each side of the ledge for the length aforesaid, and for a mining claim. That they posted and recorded a notice of said location, and have ever since held, worked, and improved the same, and in all respects in compliance with the mining laws of the United States, and the laws, customs and regulations of the miners of the mining district.

That in the notice of location posted at the discovery point, and recorded in said mining district, said mining claim was named, and has since been known as the Nabob mine.

That said Nabob mine and mining claim is situated in Little Cottonwood mining district, Salt Lake County, Utah, and is known as lot No. 96, and, with magnetic variation 18 degrees 10 minutes east, is bounded and described as follows:

Beginning at the point of discovery and running thence south 48 degrees 43 minutes east, 50 feet to the middle of the southeast end line; thence south 41 degrees 17 minutes west, 50 feet to post No. 1; thence north 41 degrees 17 minutes east, 100 feet to post No. 2;

thence north 48 degrees 43 minutes west, 1,500 feet to post No. 3; thence south 41 degrees 17 minutes west, 100 feet to post No. 4; thence south 48 degrees 43 minutes east, 15 feet to post No.
8 1, the first corner established, and containing in erea 344–100 acres.

From discovery monument, United States mineral No. 4 bears south 7 degrees 45 minutes west, 3,073 feet distant.

That since said 4th day of July, 1877, the defendants have been in the continuous occupation of said Nabob mine and mining claim, and by virtue of such location, and of a subsequent compliance with the mining laws, rules, and customs they became and were, before the alleged location of the supposed Virginia mining claim, the owners thereof, except only as against the paramount title of the United States, and ever since have been and still are such owners, and in the possession and entitled to the possession thereof; and the defendants deny the plaintiff has ever owned or been in possession of, or that at the time of the commencement of this action he owned or was in the possession of any part of said Nabob mining claim, or entitled to the possession of any part thereof.

Wherefore defendants pray they be adjudged entitled to the possession of the premises in controversy, their title thereto affirmed, and their possession quieted, and that plaintiff's complaint be dismissed, with costs, and such other relief given as may be proper.

BENNETT & HARKNESS,
Defendant's Attorneys.

Duly verified.

(Endorsed:) Filed December 27th, 1877; C. S. Hill, clerk, by B. P. Hill, deputy clerk.

9 *Summons.*

[Title of court and case.]

The people of the United States in the territory of Utah send greeting to N. C. Boatman, E. M. Varnes and E. Sells, defendants:

You are hereby required to appear in an action brought against you by the above district court of the third judicial district of the territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after service on you of this summons, if served within this county, or if served out of this county but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought upon a protest of the plaintiff to the issuance of a patent to defendants for their alleged Nabob mining claim, on account of interference with plaintiff's Virginia mining claim, both of which claims are situate in Big and Little Cottonwood mining district, Salt Lake county, Utah, and partially de-

scribed in the complaint herewith, to determine the rights of parties in said controversy, and for a decree of this court adjudging the plaintiff to be entitled to the possession of the premises in controversy, for costs of such, and all other people relief.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will apply to the court for the relief demanded therein.

Witness the Hon. Michael Schaeffer, judge, and the seal of the district court of the third judicial district in and for the territory of Utah, this 19th day of December, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] C. S. HILL, *Clerk.*

By H. S. McMILLAN,
Deputy Clerk.

10 OFFICE OF THE U. S. MARSHAL,
Territory of Utah, county of Salt Lake, } *ss.*

I hereby certify that I served the within summons in Salt Lake county, Utah territory, on the 19th day of December, 1877, on the defendants named therein, to wit, N. C. Boatman and E. M. Varnes, by delivering to N. C. Boatman personally a true copy of the within summons and a certified copy of the complaint attached thereto, and by delivering to E. M. Varnes personally a true copy of the within summons.

WILLIAM NELSON,
U. S. Marshal.

By GEO. W. CROWE, *Deputy.*
Dated January 3d, 1878.

TERRITORY OF UTAH,
County of Salt Lake. } *ss.*

I hereby certify that I served the within summons in Salt Lake county, Utah territory, on the 3d day of January, 1877, on the defendant named therein, to wit, E. Sills, by delivering to him personally a true copy of the within summons.

WILLIAM NELSON,
U. S. Marshal.

By GEO. BOWMAN CANNON, *Deputy.*

Dated January 3d, 1878. Fees $10.

(Endorsed:) Filed on return, January 4th, 1878; C. S. Hill, clerk; by H. G. McMillan, deputy clerk.

11 *Findings.*

[Title of court and cause.]

This action having been tried before the court, the facts and conclusions of law are found and made as follows:

1st. On or about the 4th day of July, 1877, the defendants

located the Nabob mining claim, situate in Little Cottonwood mining district, Salt Lake county, Utah, upon a lode of rock in place bearing silver and other metals, the claim consisting of 1,500 feet in length, to wit, 50 feet southeasterly from the discovery point and 1,450 feet northwesterly from the same point.

That a notice of location was posted at the discovery point, in which was given the date of location, to wit, July 4th, 1877, the names of the locators, the extent of the claim, and described the same as situated on Flagstaff hill, about 150 feet more or less westerly from the discovery shaft of the Flagstaff mine, and about 36 feet more or less northeasterly from the northerly side line of the Rough & Ready patented ground, and the metes and bounds were therein stated to be described by a stake driven 50 feet southeasterly from the discovery shaft marked No. 1, thence running northwesterly 500 to a red-pine stump blazed on north side, thence a tree over the divide marked 900 feet, thence to a point 600 feet distant in Day's fork. A copy of the same notice was filed for record in the office of the recorder of said mining district on the 9th day of July, 1877.

2d. The said locators continued in possession of said claim, actually working the same by an incline run downward from the discovery point until after the location of the Virginia mining claim, and on the day of the location of the Virginia mining claim the Nabob was being worked by several men on the conflict area, and a shanty was there erected.

12 3d. That the locators and claimants of the Nabob mining claim in each year since the location have done more than $100 worth of work thereon.

4th. That at the time of the location the locators marked the claim on the ground by setting a stake at the discovery point, by setting a stake in the centre of the southeasterly end line marked "No. 1, Nabob," by setting a stake at each corner of the southeasterly end line, by blazing and marking a red-pine stump on the center line about 500 feet northwesterly from the southeasterly end center stake, and by blazing and marking a tree on the center line about 900 feet northwesterly from the southeasterly end of the claim.

That no marks on the ground were made either by the locators or the surveyor, who surveyed the claim for patent on the northwesterly 600 feet of the claim, the ground being down a steep and inaccessible declivity, and the patent survey of that portion being made by triangulation.

That the survey of the Nabob mining claim, as set forth in the answer, is substantially in conformity to the boundaries thereof as located.

6th. That on the 10th day of August, 1877, the plaintiff located the Virginia mining claim, and recorded the same, and marked it on the ground so as to include the conflict area in dispute, and on which the defendants were at work as aforesaid.

The notice posted and recorded was sufficient under mining laws,

and the plaintiff has yearly done more than $100 worth of work thereon.

As conclusion of law it is found:

1st. That the notice of the location of the Nabob mining claim contained a sufficient description by reference to natural objects and permanent and well-known monuments to identify the same.

2d. That said Nabob claim was so marked on the ground that its boundaries could be readily placed.

13 3d. That by reason of the prior location of the Nabob mining claim, and a compliance in respect thereto with mining laws and customs by the defendants, the defendants at the commencement of the action were and still are entitled to the possession of the area in conflict with the Virginia claim, and are now entitled to judgment for said area and costs.

By the court. JOHN A. HUNTER,
Judge.

(Finding endorsed:) Filed November 3, 1879; O. J. Averell, clerk; by H. G. Millan, deputy clerk.

Order of Court.

[Title of case.]

This cause having been tried before this court heretofore, and the court now being fully advised, files its findings of fact and conclusions of law thereon, and orders entry of judgment in accordance therewith against the plaintiff and in favor of defendants for the possession of the area in conflict between the Nabob and Virginia mining claims as described in the complaint, together with defendants' costs here incurred, taxed at $61.16-100.

Judgment entered in judgment book D, folios 725–26.

14 *Judgment.*

[Title of court and case.]

This action having been tried before the court at the September term, 1879, J. R. McBride appearing for the plaintiff, and Bennett & Harkness attorneys for defendants, and findings of fact and conclusions of law having been made and filed, now, in pursuance thereof and on motion of Bennett & Harkness, attorneys for defendants, it is ordered and adjudged—

That at the commencement of the action the defendants were and now are in the possession and entitled to the possession of the Nabob mining claim, situated in Little Cottonwood mining district, Salt Lake county, Utah, and in possession and entitled to the possession of the conflict area between said Nabob and the Virginia mining claims, described as follows:

Commencing at a point in the southwest boundary line of the survey of said Virginia claims 363½ feet north, 40 degrees 1 minute west from the southwest corner thereof, marked post 1; thence

along said boundary line north 40 degrees 1 minute west, 479½ feet; thence south 48 degrees 43 minutes east, 474 feet; and thence south 41 degrees 17 minutes west, 72½ feet to the beginning, containing 394-1,000 acres.

That the adverse claim of the plaintiff is unfounded, and defendants' possession and right of possession as against said adverse claim are quiet and confirmed, and it is adjudged that the defendants have and recover of and from the plaintiff the costs of this action, taxed at $61.15-100.

By the court. JOHN A. HUNTER,
Judge.

Dated October 11, 1879.

(Judgment endorsed:) Filed November 3, 1879; O. J. Averell, clerk; by H. G. McMillan, deputy clerk.

15 *Statement on motion for new trial and on appeal from the judgment.*

[Title of court and case.]

This is an action to try the right of possession to a parcel of mining ground, which is in conflict between the plaintiff, claiming as the locators and owners of that certain mining claim in Little Cottonwood mining district, Salt Lake county, Utah territory, called and described in the complaint as the Virginia, and the defendants, claiming to be the locators and owners of that other certain mining claim described in the pleadings and called the Nabob, situated in said district. The plats and diagrams used on the trial will indicate the exact nature and extent of the conflict.

The cause being regularly called, the respective parties were present, the plaintiff by John R. McBride, his attorney, and the defendants by Messrs. Bennett & Harkness, was tried by the court October 11th and 12th, 1879, the parties consenting thereto.

On behalf of the plaintiff there were introduced and sworn as witnesses the following: Lewis Martin, Charles Brooks, Moses Hirshman, John R. McBride, J. H. Beatty, and J. A. Groesbeck.

On behalf of the defendants there were introduced and sworn as witnesses Charles Brough, Elijah Sells, J. A. Varnes, O. A. Palmer, —— Green, —— Haskey, —— Grimly, —— Fitzsimmons.

The plaintiff by his witnesses proved that on the 8th day of August, 1877, the Virginia location was made on the ground, by metes and bounds as alleged in the complaint.

That it was surveyed by Charles P. Brooks, deputy U. S. mineral surveyor, who was assisted by Jas. H. Beatty, Lewis Martin, and Joseph Rosenthal, and a portion of the time by Moses Hirschman.

16 That the posts and monuments set forth in the complaint, showing the limits of the claim, were erected on the ground on that day.

That said location as to surface ground was intended to cover the

Flagstaff vein lying northwesterly of the patent lines of the Flagstaff lot No. 38 patent, and was directed by persons familiar with the course of that lode as shown by the underground workings of the Flagstaff mine.

The stake in the center of the southeasterly end line of the Nabob was observed by the parties making the survey, and the stake at the discovery of said Nabob 50 feet northwesterly was also observed, and the notice posted on it.

Before making the survey, Mr. Brooks and Mr. Beatty, with a copy of the notice of the Nabob location in hand, made search for the lines and boundaries of the Nabob claim, and testify that they found a stake in the center of what is described by the defendants as the Nabob southeasterly end line, and on it written Nabob No. 1.

That about 50 feet distant and at the point called the discovery they saw another stake with a notice of location posted thereon.

That at a point indicated on the plat A, used in evidence and made by Brooks, they found a large red pine stump, from the side of which the surface bark and wood had been hewed, and on the surface was written in pencil "Central line of Nabob claim," 500 feet from end stake, being the southeast 500 feet of claim; and that at a point just across the summit of the divide between Little and Big Cottonwood they found a dead pine tree blazed, and on it written in pencil "Nabob claim, 900 feet northwesterly from discovery."

Said pine tree is also in the plat A.

17 That they did not find any other marks of the Nabob claim, and that they examined carefully the ground now claimed by the Virginia and Nabob for the purpose of finding them.

On that day saw no pine stump or pine tree corresponding to those described in the notice of location, except those marked on the plat.

Men were seen at work at the Nabob incline shaft, (the discovery,) but no application was made to them to point out the Nabob lines.

After making the examination above stated the Virginia survey was made, and included within its lines the Nabob discovery and Nabob No. 1 stake.

It was admitted that both the Nabob and Virginia claimants, respectively, had from the date of their several locations done all the work and labor required by the mining laws to entitle them to hold their claims, and to a U. S. patent; and that the notices of location were duly posted and recorded as set out in the pleadings.

The plaintiff's testimony showed that there is a mineral belt or lode running southeasterly and northwesterly from a point distant about 1,500 feet from the disputed ground to the southeast, known as the North Star and that the North Star, Alta, South Star, and Titus and Flagstaff mines are all on said lode.

That near the Flagstaff discovery on the Flagstaff claim, about 150 feet from the Nabob discovery, this lode made a bend to the

northerly, and is supposed to pass the summit of the ridge from the Little to the Big Cottonwood through the depression upon which the Virginia was laid.

The Nabob discovery point is just inside the vein or lode, and on the southerly or footwall of the lode.

It was shown by the plaintiff's proof that the Flagstaff mine had been owned by the Flagstaff Silver Mining Company of
18 Utah since February, in the year of 1872; that a claim 2,000 feet in length, 1,000 feet to the northerly of discovery, had been patented to the company's grantees, and conveyed to it the surface lines of the patent, embracing only about 100 feet in length of the lode.

That claiming, notwithstanding the course of the patent lines, that it had a right to follow the lode for the length described by the patent, the company and its grantees had extended its works beyond the lines covered by the patent, with and along the course of the vein underground beyond that portion, the apex of which crops in the ground, in dispute between the plaintiff and defendants.

That drifts and levels, driven from the discovery shaft and main working shaft of the Flagstaff mine, had penetrated the hill along the vein in its dip and strike to the northerly, and at the time of the location of both the Nabob and Virginia claims was used, held, and occupied at various depths by those having possession in behalf of said company.

And that the workmen and miners in both the Virginia and Nabob, before reaching the depth of 100 feet, distinctly heard the workmen employed in the Flagstaff mine, and the mining works were actually connected at different points underground.

That the Virginia tunnel indicated in the map of the underground works was connected with the old Flagstaff works at a point about 140 feet in depth, and the Nabob at other points, not exceeding that.

That the vein was occupied on its course and dip by said Flagstaff company to a distance to the northwest exceeding the limits of the ground in dispute; said occupation being entirely underground, and not visible from the surface.

On behalf of the defendants, it was testified by their witnesses—
That about the 4th of July, 1877, James Varnes struck
19 the ore at the place afterward called the Nabob discovery, the ore coming at that point to the surface.

That he communicated the fact to others; and on the following 9th of July the Nabob was located in form by Charles Brough and Boatman for the defendants.

They planted a stake marked Nabob No. 1, in the center of the southeasterly end line, and marked it as before stated.

They planted the discovery stake 50 feet northwesterly at the point called discovery, and on it posted a notice describing the location, a copy of which is annexed hereto, marked Exhibit C, and

being at the time acting recorder, Brough himself recorded it in the district mining records.

Brough testified that they also planted a stake at the southeast corner of the claim as now surveyed, and also one at the northeast corner.

That he went northwesterly up the hill towards the summit of the divide, and about 500 feet (measured with a tape line) found a red-pine stump, which he blazed, and upon it wrote in pencil the words "Center line, Nabob claim, 500 feet from end stake of said claim," being the southeast 500 feet of claim; that this stump was on the center line, and was in view of the discovery stake. This stump was described by witness as from 6 to 10 feet high, about 18 inches in diameter at the ground, and from 10 to 12 inches in diameter at the top, and distinctly visible from the discovery point.

That they went to the summit, in the same direction, and just over the divide marked a dead pine tree as a 900-foot monument, and blazed and marked it 900-foot stake northwest from Nabob mine-discovery shaft.

That they found a tree to the southwest of this, about 50 feet from the 900-foot tree, and blazed that, intending these two last trees as side-line monuments.

No marking was done to the northwest of these points, because of the inaccessible and precipitous nature of the ground beyond the divide.

The 900-foot tree described by Brough is situated north and east of the one described by Brooks and Beatty about 270 feet.

Sells testifies that about the 20th of July, 1877, he went on the ground with Brough and saw the stake marked Nabob No. 1, in the center of the southeasterly end line.

That Brough there pointed out to him the northeast and southwest corners of the Nabob claim, which consisted of stakes standing from 10 to 12 inches above the ground, and each about 50 feet from the stake No. 1. That he saw the discovery stake and notice at the place where the incline shaft was then being worked.

That up the hill towards the northwest Brough pointed out a stump, and told him that was on the center line of the claim, but he did not visit it, and as it was several hundred feet away did not know whether it was marked or not.

He saw no other marks or monuments on the claim, and knew of none.

Varnes testifies that he found the ore at discovery on the 4th of July, 1877, and told the parties who were afterwards named in the location That he was not present when the location was made by Brough and Boatman, but was there a few days afterwards and saw the stake No. 1, the northeast and southwest corners described by Brough and Sells, and the discovery stake and notice.

That he went up the hill and saw the red-pine stump described by Brough, and the blaze and pencil-writing on it, describing it as

being in the center line of the Nabob claim 500 feet northwest.

21 That just over the divide he found a pine tree marked Nabob, 900 feet northwest from discovery, and that he then took a small piece of board, and wrote Nabob claim on it and nailed it to a tree near the summit.

Saw no other marks or monuments on the claim.

That about a year afterwards, when making another location, he saw in a southwest direction from the red-pine stump described by Brough and marked as the center line of the Nabob, and entirely off the claim, a pine stump, with pencil-writing on it purporting to be the center line of the claim, and that he hewed off the writing with his axe. This he did to prevent persons being misled as to the course of the claim.

He saw in the vicinity of this stump a number of trees marked Nabob. All were off the line of the claim, and the marking seemed to have been done promiscuously.

Grimly and Fitzsimmons testified that they went to work on Nabob in July, 1877, about the last of the month. Saw the corner stakes of the southeasterly end line, the stake at discovery and the notice on it.

One of the corner stakes was lying down, and the stump called the 500-foot stump was pointed out to them.

Green testified that he assisted the United States surveyer, O. A. Palmer, to make the survey, August 28, 1878.

He saw the stakes of the southeasterly end line. One of the stakes had been knocked down. He carried the chain; they run a center line from the southeasterly No. 1 stake.

Saw the red-pine stump described by Brough. Noticed
22 it was marked Nabob claim. Saw a piece of board on a tree, near the top of the hill with Nabob on it.

Haskins testified that he went to work on the Nabob mine on the day the survey was made by Palmer. Saw the three southeasterly end stakes, and one of the corner stakes had been knocked down, but was lying at the place where planted.

Saw the red-pine stump described by Brough with pencil-marks on it, and a tree near the summit with a board nailed on it, and marked Nabob. Was helping to make the survey. Did not see the stakes of the Virginia claim at the summit of the divide or any other point.

In February, 1878, he was over to the southwest of the Nabob claim, and saw a number of trees marked Nabob and Nabob claim. The marks were not in any line, but were made promiscuously.

O. A. Palmer testified that he was and is a deputy United States mineral surveyor.

That on the 28th day of August, 1887, he made a survey of the Nabob mining claim for patent. That the plat of the ground (plat B,) made by himself and exhibited to the court, was a correct plat of the survey.

That he went on the ground with the witnesses Brough, Green and Haskin, and with a copy of the notice of location. That he found stake marked Nabob No. 1, and set his instrument.

That a red-pine stump on the hillside towards the divide was in line with this stake and discovery northwest. That he found a post with a notice of location at discovery on it. That he measured from these to the stump and found the center about 450 feet from discovery.

That the stump was of red pine, was blazed, and had marked on it "Nabob centre line 500 feet northwest from southeast end of claim" written in pencil.

23 That he run the line to the summit, following the line of small stakes, and then found just over the divide a pine tree marked 900 feet. It was within a few feet of the center line of the claim. Near it, perhaps 40 or 50 feet, was a tree on the southwesterly side with a piece of a candle-box nailed on it marked Nabob.

There were one or two other trees near the summit blazed. They were near the side line of the claim. I measured from stake No. 1 to the northeasterly 50 feet and found a stake standing. I then measured to the southeasterly 50 feet from No. 1 and found a stake lying down on the ground within a few points. I established the northeasterly and southeasterly corners by these stakes, which were substantially in the proper places and at the proper distances. I did not see any stakes of the Virginia survey; did not examine for them.

The northwesterly 600 feet of the claim was surveyed by triangulation, and the lines and corners were not established on the ground, because of the precipitous surface.

Mr. Brough pointed out the stakes and other marks on the ground. I had no difficulty in finding them.

The discovery stake is about 100 feet northwesterly of the Flagstaff patent side line.

I am acquainted with the general course of the Flagstaff lode. The Nabob discovery is at the foot-wall of the lode, just inside of it. The general strike of the lode is about northwest from the Emma location, varying some as the surface varies, until the Flagstaff discovery is passed. It then, I think, in rising the hill, which is very steep, strikes at the surface more northerly, and passes the divide between Big and Little Cottonwood through the gap

24 in the hill immediately above the Nabob. The general course is about north 60 degrees west up to the Nabob, where it is more northerly.

The dip is north about 50 degrees east, at an angle of about 45 degrees from the horizon, varying at some points.

Brooks, on being recalled as a witness, testified that in December, 1877, he revisited the ground, and in company with Mr. Beatty went to the red-pine stump marked on the plat made by him, and found lying at the base of the stump a number of chips. Apparently these had been chopped off the stump with an axe. The chips

were brought into court and bore pencil marks containing the words "Nabob, 500 feet," and some other isolated words in pencil. The witness had preserved these because he had been told that Varnes was seen hewing these marks of the stumps.

That in surveying the Virginia for location and patent he ran and chained the center line and set the stakes on the side lines at the corners, without measuring the side lines.

That the 500-foot stump and 900-foot tree on plat A were connected only with the Virginia survey.

That the bearings to stake 1 of the Nabob, or Nabob discovery, were not taken and are not shown, and could only be shown by a mathematical calculation, which he had not made.

The only thing shown on plat A concerning the Nabob by course are the direction of the stump and tree, which he found from fixed points in the center line of the Virginia survey.

John R. McBride testified that about July 20, 1877, he was on the ground, with a view of determining where the Flagstaff lode crossed the divide.

That he saw Boatman, one of the defendants, at work at the point called Nabob discovery with another man. They were raising ore by a windlass out of an incline shaft. Had a brush shanty over the incline to shelter the men from the sun.

Said to Boatman, with whom he was acquainted, that he was on the Flagstaff. Boatman replied that he was not; that there were three veins there—the Flagstaff, the Ohio River, and the Nabob—and the Nabob was a vein lying between the other two. That if it was Flagstaff he didn't want it.

The witness asked Boatman where his Nabob vein ran, and he pointed up the hill in the direction of a high point—the direction being about as indicated by Brooks' plat of Nabob.

Witness asked where his (Boatman's) lines run, and he replied, "We havn't surveyed it yet."

Witness told the claimant of the Virginia, where the vein would cross the hill, and suggested to him to locate the Virginia so as to cover it.

Stevenson, a witness for the plaintiff, testified that in December, 1877, he went on the ground with Brooks to assist in making some measurements. Thinks that the southwesterly side line of the Virginia is about 270 feet easterly from the dead pine marked on Brooks' map 900-foot tree.

Saw Brooks go to the red-pine stump and pick up the chips lying at the root of the stump.

Assignment of Error.

Specifications of the particular errors upon which the plaintiff will rely on the motion for a new trial, and on the appeal from the judgment.

26 First.—Insufficiency of the evidence to justify the finding of the court, in this:

The evidence shows that the boundaries of the Nabob claim were not established on the limits of the claim defined at the time of the location, or afterwards, until the Virginia was located, surveyed, and marked on the ground and recorded; whereas, the first and fourth findings of fact find that the defendants located the Nabob by the metes and bounds described therein, and marked the same on the ground.

Second.—The notice of location of the said Nabob claim, as posted and recorded, is insufficient either as a notice or a record to indicate the existence of any lawful claim.

The findings and judgment are against law, in this:

First.—The notice of location on the Nabob was insufficient.

The notice of the claim as recorded was insufficient.

Second.—The claim was not so marked on the ground that its boundaries could be readily traced, or so that they could be found, until after the survey and location of the Virginia claim.

Third.—The lode upon which the claim called the Nabob was located, including all that part in controversy, was then occupied underground, and had been since 1872, as a mine by the Flagstaff Silver Mining Company, who then and always had claimed to own the vein, and no adverse claim could be initiated to it by the defendants under such circumstances.

Third.—The Nabob location having been made on a vein then actually occupied for mining purposes by other parties, the same was void, and could confer no right or title to the possession upon which claim for a mineral patent could be based; and the

27 judgment that the defendants are the owners of said ground in dispute is erroneous.

The foregoing statement of the evidence, with the maps, plats, notices and documents referred to, contain all the testimony in the case, and the statement is full, true and correct.

And it is stipulated that the same shall stand as a statement on appeal from the judgement as well as on motion for new trial, and on appeal from any order made on said motion.

It is further stipulated that the statement was made in due time after the trial, and omissions as to the filing in court by either party are hereby waived on behalf of the parties respectively.

BENNETT & HARKNESS,
Attorneys for defendants.

SUTHERLAND & McBRIDE,
Attorneys for plaintiff.

December 8, 1879.

[Title of court.]

E. M. Varnes, N. C. Boatman & E. Sells, plaintiffs,
vs.
Anton Eilers, defendant.

This being a cross suit on protest by the plaintiffs as owners of the Nabob mining claim, against the application of the defendant as owner of Virginia mining claim for patent therefor, and the case having been heard and submitted, and decided on the same
28 evidence upon which the suit of Eilers vs. Boatman et al., was determined, it is now stipulated that this action on motion for new trial and on appeal shall abide the event of the case in which Eilers is plaintiff and Boatman et al., defendants, and all orders, judgments and decisions made in the suit of Eilers vs. Boatman et al. in which the foregoing statement is settled, shall be made in the case in the title of this stipulation, only reversing the parties in such proceedings, so as to make them applicable.

BENNETT & HARKNESS,
Attorneys for plaintiffs.
SUTHERLAND & McBRIDE,
Attorneys for defendants.

Statement and stipulation endorsed:
Filed December 22, 1879. O. J. Averell, clerk, by H. G. McMillan, deputy clerk.

[Title of court and cause.]

Notice of intention to move for new trial.

To Messrs. Bennett & Harkness, attorneys for the defendants above named:

Take notice that the plaintiff, Anton Eilers, on the fifth day of December, A. D. 1879, at the court-room in Salt Lake city, at the hour of ten o'clock A. M. of said day, or as soon thereafter as the counsel can be heard, will move this court for a new trial in said cause. Said motion will be made and based on the following grounds:

29 First. Insufficiency of the evidence to justify the finding of facts made by the court.

Second. That the findings and decision are against law.

The particular statement and specifications of the errors complained of will be made in due time.

Yours, &c.,
SUTHERLAND & McBRIDE,
Plaintiff's attorneys.

Nov. 20th, 1879.

peal, we, the undersigned, residents and householders of Salt Lake county, Utah territory, do hereby jointly and severally undertake and promise on the part of the appellent that the said appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding two hundred dollars, in which amount we acknowledge ourselves jointly and severally bound.

F. W. BILLING.
W. P. McBRIDE.

Dated January 3d, 1880.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

F. W. Billing and W. P. McBride, the persons named in and who subscribed the foregoing undertaking, as sureties thereto, being each duly sworn, says, each for himself, that he is worth the amount named in said undertaking as the penalty thereof, over and above all his debts and liabilities, and exclusive of
32 property exempt from execution, and that he is a resident and householder of said county.

W. P. McBRIDE,
F. W. BILLING.

Sworn to and subscribed before me, this 3d day of January, 1880.

EDWARD P. SUTHERLAND,
[NOTARIAL SEAL.] *Notary public.*

Bond on appeal endorsed: Filed January 3d, 1880. O. J. Averell, clerk. By H. G. McMillan, deputy clerk.

Filed this 29th day of April, A. D. 1880.

E. T. SPRAGUE,
33 *Clerk sup. court.*

34 [Here follow two maps marked pages 33 and 34.]

35 Afterwards, at a term of said supreme court of Utah territory, begun and held at Salt Lake city, in said territory, the 7th day of June, A. D. 1880, proceedings were had in said court and cause, and entered on the minutes thereof, as follows, to wit:

WEDNESDAY, *June 23d, A. D.* 1880.

* * *

Anton Eilers, appellant,
vs.
N. C. Boatman et al., respondents. } From 3d dist.

Upon the consent of the counsel of the respective parties, ordered that this cause be and is continued until the next term of this court.

36 Afterwards, at a term of said supreme court of Utah territory, begun and held at Salt Lake city, the 10th day of January, A. D. 1881, proceedings were had in said court and cause, and entered on the minutes of said court as follows, to wit:

MONDAY, *January* 10, *A. D.* 1881.

* * *

Anton Eilers, appellant,
vs
N. C. Boatman et al., respondents. } From 3d dist.

On consent of attorneys of the respective parties, ordered that this cause be continued till the next term of this court.

37 And afterwards, at a term of said supreme court of Utah territory, begun and held at Salt Lake city, on the 6th day of June, A. D. 1881, proceedings were had in said court and said cause, and entered on the minutes of said court, as follows, to wit:

MONDAY, *June* 13*th*, A. D. 1881.

* * *

Anton Eilers, appellant,
vs.
N. C. Boatman et al., respondents. } From 3d dist.

C. K. Gilchrist, esq., is substituted for Messrs. Sutherland & McBride as attorney for appellant in this cause.

Also MONDAY, *June* 20*th*, A. D. 1881.

Anton Eilers, appellant,
vs.
N. C. Boatman et al., respondents. } From 3d dist.

This cause coming on regularly for hearing was argued by C. K. Gilchrist, esq., for appellant, and R. Harkness, esq., for respondents; submitted and taken under advisement.

38 SATURDAY, *July* 23*d*, A. D. 1881.

* * *

Anton Eilers, appellant,
vs
N. C. Boatman et al., respondents. } From 3d dist.

In this cause this court adopts and affirms the findings of the district court therein, and in addition thereto finds that the value of the property in controversy therein exceeds one thousand dollars; and this cause having been heretofore argued and submitted, and the court having been sufficiently advised therein, it is now here ordered and adjudged that the judgment of the district court therein be and the same is hereby affirmed; and further, that respondents have and recover of and from appellant the sum of twenty-three and 15-100 dollars costs.

Thereupon an appeal to the supreme court of the United States from the judgment of this court in this cause was prayed by said appellant, by his counsel C. K. Gilchrist, and allowed, and at the request of said counsel the amount of the bond on such appeal is hereby fixed at $200.

Thereafter such bond on appeal was presented, approved, and filed, and proceedings are stayed pending such appeal.

38½ And on the same said 23d day of July, A. D. 1881, was filed in the office of the clerk of said supreme court of Utah territory a bond on appeal, of which the following is a copy, to wit:

39 In the supreme court.

Anton Eilers
vs.
N. C. Boatman, E. M. Varnes and E. Sells.

Know all men by these presents that we, Edward Austin and Charles K. Gilchrist, each residents of Salt Lake city, Utah territory, are held and firmly bound unto N. C. Boatman, E. M. Varnes and E. Sells in the full and just sum of two hundred (200) dollars, to be paid to the said N. C. Boatman, E. M. Varnes and E. Sells, their certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals, and dated this 23rd day of July, A. D. 1881.

Whereas lately, at a regular term of the supreme court of the territory of Utah, in a suit pending in said court, in the case of Anton Eilers, appellant, vs. N. C. Boatman, E. M. Varnes and E. Sells, respondents, a judgment and decree was rendered therein against the said Anton Eilers, appellant, and in favor of the said N. C. Boatman, E. M. Varnes and E. Sells, respondents, quieting the title and possession in them of a portion of the Nabob
40 mining claim in Little Cottonwood mining district, Salt Lake county, Utah territory, and awarding the title thereof to them, and the said Anton Eilers having obtained and taken an appeal from said judgment and decree to the supreme court of the United States, and has procured a citation directed to the said N. C. Boatman, E. M. Varnes and E. Sells, citing and admonishing them to be and appear at a session of the said supreme court of the United States to be holden at Washington city, District of Columbia, on the second Monday of October next, to wit, 1881.

Now the condition of this obligation is such that if the said Anton Eilers shall prosecute his said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] EDWARD AUSTIN.
[SEAL.] CHAS. K. GILCHRIST.

41 TERRITORY OF UTAH, } ss.
County of Salt Lake, }

Edward Austin and Charles K. Gilchrist, being duly sworn, each for himself and not one for the other, doth depose and swear that he is a resident of Salt Lake city and county, Utah territory, and that he is worth the sum of ——— thousand dollars over and above his debts, liabilities, and property exempt from execution.

EDWARD AUSTIN.
CHAS. K. GILCHRIST.

Subscribed and sworn to before me this 23d day of July, 1881, by said Gilchrist, and solemnly affirmed at same time by said Austin.

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

(Endorsed:) In supreme court. Anton Eilers *vs.* N. C. Boatman et al. Bond on appeal.

The within bond approved and the appeal prayed allowed by the court, and stay ordered, this 23d day of July, A. D. 1881.

JOHN A. HUNTER,
Chief Justice.
STEPHEN P. TWISS,
PHILIP. H. EMERSON,
Associate Justices.

Filed July 23d, 1881.

E. T. SPRAGUE,
Clerk Sup. Court.

41½ And on said 23d day of July, 1881, was filed in the office of said clerk of the supreme court of Utah territory a notice or statement of appeal, of which the following is a copy, to wit:

42 In the supreme court of the territory of Utah.

Anton Eilers, appellant,
vs.
N. C. Boatman, E. M. Varnes, and E. Sells, respondents.

The above-named appellant, Anton Eilers, considering himself aggrieved by the final degree entered on the 23d day of July, A. D. 1881, in the above-entitled cause, doth humbly appeal therefrom to the supreme court of the United States, and he prays that his appeal may be allowed and that a transcript of the record proceedings and evidence in the case, duly authenticated, may be sent to the said supreme court.

C. K. GILCHRIST,
Solicitor for Appellant.

July 23d, 1881.

(Endorsed:) Filed July 23d, 1881. E. T. Sprague, clerk of sup. court.

42½ And on the same day was issued, served, and filed the following citation, to wit:

43 UNITED STATES OF AMERICA, *ss.*

By the Honorable John A. Hunter, chief justice of the supreme court of the territory of Utah.

To N. C. Boatman, E. M. Varnes, and E. Sells, greeting:

Whereas Anton Eilers has lately appealed to the supreme court of the United States from a judgment and decree lately rendered in the supreme court of the territory of Utah, made in favour of you, the said N. C. Boatman, E. M. Varnes, and E. Sells, and has filed the security required by law, you are therefore hereby cited to offer before the supreme court of the United States, at the city of Washington, District of Columbia, on the second Monday of October, A. D. 1881, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at Salt Lake city, Utah territory, in the supreme court of the territory of Utah, on the 23d day of July, A. D. 1881.

JOHN A. HUNTER,
Chief Justice of the Supreme Court of the Territory of Utah.

Attest, with the seal of said court.
[SEAL.] E. T. SPRAGUE, *Clerk.*

44 Service of a copy of the within citation on the within-named N. C. Boatman, E. M. Varnes and E. Sells accepted and acknowledged this 23d day of July, A. D. 1881.

N. C. BOATMAN,
E. M. VARNES, &
E. SELLS,
by BENNETT & HARKNESS,
Their Atty's.

Witness:
E. T. SPRAGUE, *Clerk Sup. Ct.*

(Endorsed:) In the supreme court. Anton Eilers *vs.* N. C. Boatman et al. Citation. Filed July 23d, 1881. E. T. Sprague, clerk.

45 TERRITORY OF UTAH, } *ss:*
Salt Lake county, }

I, E. T. Sprague, clerk of the supreme court of said territory of Utah, in pursuance of the appeal last aforesaid, do herewith